A

ASIAN INTERNATIONAL ARBITRATION CENTRE v. ONE AMERIN RESIDENCE SDN BHD & ORS AND ANOTHER APPEAL

FEDERAL COURT, PUTRAJAYA
ABANG ISKANDAR PCA
B ABU BAKAR JAIS FCJ
HANIPAH FARIKULLAH FCJ
[CIVIL APPEAL NOS: 01(i)-31-12-2023(W) & 02(i)-66-12-2023(W)
13 FEBRUARY 2025
[2025] CLJ (JT1)

C

Abstract – *(i) The immunity from a suit and from other legal processes, in para. 1 of the First Schedule to the International Organizations (Privileges and Immunities) Act 1992 ('IOPIA') conferred upon the Asian International Arbitration Centre ('AIAC') as an international organisation, under the Kuala Lumpur Regional Centre for Arbitration regulations, is applicable to render the AIAC immune from judicial review, of acts and decisions made by the AIAC in its capacity as the domestic and statutory adjudication authority under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'); (ii) The IOPIA and the CIPAA do not oust the High Court's inherent powers in judicial review proceedings; (iii) There is no necessity to draw distinction on the capacity of the AIAC, either as an international arbitral institution or the statutory adjudication authority, before the AIAC is entitled to enjoy the immunity conferred under the IOPIA and the CIPAA.*

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ARBITRATION: *Proceedings – Immunity – Immunity of Asian International Arbitration Centre ('AIAC') – Judicial review application sought to impugn acts and decisions of AIAC – Functions of AIAC as statutory adjudication authority under Construction Industry Payment and Adjudication Act 2012 ('CIPAA') – Extent of immunity enjoyed by international organisation in Malaysia – Whether legal immunity conferred on AIAC pursuant to International Organizations (Privileges and Immunities) Act 1992 ('IOPIA') applied in judicial review proceedings brought against AIAC in relation to its domestic and statutory functions under CIPAA – Whether High Court's inherent powers in judicial review proceedings could be ousted by immunity conferred on AIAC by virtue of IOPIA and CIPAA – Whether there was necessity to draw distinction on capacity of AIAC either as international arbitral institution or statutory adjudication authority before AIAC entitled to immunity conferred under IOPIA and CIPAA*

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CONSTRUCTION LAW: *Adjudication – Arbitration – Immunity of Asian International Arbitration Centre ('AIAC') – Judicial review application sought to impugn acts and decisions of AIAC – Functions of AIAC as statutory adjudication authority under Construction Industry Payment and Adjudication Act 2012 – Extent of immunity enjoyed by international organisation in Malaysia – International Organizations (Privileges and Immunities) Act 1992*

CIVIL PROCEDURE: *Judicial review – Proceedings – Immunity of Asian International Arbitration Centre ('AIAC') – Judicial review application sought to impugn acts and decisions of AIAC – Functions of AIAC as statutory adjudication authority under Construction Industry Payment and Adjudication Act 2012 – Extent of immunity enjoyed by international organisation in Malaysia – International Organizations (Privileges and Immunities) Act 1992*

One Amerin Residence Sdn Bhd ('One Amerin') had appointed Ragawang Corporation Sdn Bhd ('Ragawang') as the contractor for the construction of Amerin Mall and Residence. The project was carried out and completed by Ragawang. A dispute arose between the parties regarding the payment for the works done. Ragawang commenced adjudication proceedings against One Amerin for the sum of RM8,771,124.07 and submitted a request to the Director of the Asian International Arbitration Centre ('AIAC') for the appointment of an adjudicator to adjudicate its claim. The Director of the AIAC then appointed an adjudicator. One Amerin, however, objected to Ragawang's request to the Director of the AIAC for the appointment of an adjudicator. The AIAC responded that the said appointment was valid and instructed the parties to pay an advance security deposit of RM60,600 in equal shares. While Ragawang had deposited with the Director of the AIAC its half share of the advance security deposit, One Amerin refused to do so. The adjudicator then proceeded and completed the adjudication proceedings. While the adjudication decision was still pending, One Amerin filed a judicial review application concerning the acts and decisions of the AIAC which, according to One Amerin, were illegal, invalid, unlawful and of no effect in law. The AIAC applied to strike out One Amerin's judicial review proceedings. The High Court allowed the AIAC's striking out application on the grounds that the AIAC was clothed with immunity, under the International Organizations (Privileges and Immunities) Act 1992 ('IOPIA') and the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'), from any court proceedings, including judicial review. On appeal, the Court of Appeal reversed the decision of the High Court, holding that: (i) the AIAC was only entitled to assert immunity pursuant to the IOPIA in its capacity as an international arbitral institution and not in its capacity as the statutory adjudication authority; and (ii) the legal immunity conferred on the AIAC by virtue of both the IOPIA and the CIPAA did not extend to judicial review proceedings. Hence, the present appeals. The questions of law that arose were: (i) whether the immunity from the suit and

from other legal processes in para. 1 of the First Schedule to the IOPIA conferred upon the AIAC, as an international organisation under the Kuala Lumpur Regional Centre for Arbitration ('KLRCA') Regulations, was applicable to render the AIAC immune from judicial review of acts and decisions made by the AIAC in its capacity as the domestic and statutory adjudication authority under the CIPAA ('question 1'); (ii) whether the High Court's inherent powers in judicial review proceedings could be ousted by the immunity conferred on the AIAC, by virtue of legislations passed by Parliament, *ie*, the IOPIA and the CIPAA ('question 2'); and (iii) whether there was a necessity to draw a distinction on the capacity of the AIAC, either as an international arbitral institution or the statutory adjudication authority, before the AIAC was entitled to enjoy the immunity conferred under the IOPIA and the CIPAA ('question 3').

Held (allowing appeals; setting aside decision of Court of Appeal)
Hanipah Farikullah FCJ (delivering the judgment of the court):

(1) The host country agreement was not a static document but one that must be construed dynamically in light of the fundamental object and purpose behind the establishment of the AIAC. The AIAC's function, as envisioned under the 1981 host country agreement, was not limited to administering international arbitration matters but also extended to catering for domestic arbitrations. As such, the reasoning adopted by the Court of Appeal, that the immunity conferred on the AIAC under the IOPIA was only intended to cover functions of an 'international' character and was therefore, not applicable to 'domestic' functions such as statutory adjudication, was untenable. To restrict the immunity under the IOPIA only to situations where the AIAC acts in the capacity of an international arbitral institution, as done by the Court of Appeal, would necessarily mean that the organisation would not enjoy immunity in respect of any of its other extensive range of alternative dispute resolutions functions. This would have the effect of crippling the functioning of the AIAC. The AIAC, in acting as the statutory adjudication authority, was therefore clothed with immunity pursuant to the IOPIA. There was no necessity to draw a distinction on the capacity of the AIAC, either as an international arbitral institution or the statutory adjudication authority before it was entitled to enjoy the immunity conferred under the IOPIA. (paras 91-94, 98 & 100)

(2) The judicial review application filed by One Amerin in the High Court, which formed the subject matter of the present appeals, challenged the legality and constitutionality of certain acts and decisions carried out or made by the AIAC in the exercise of its functions as the statutory adjudication authority. There was no merit to the contentions by One Amerin that the AIAC had acted outside its scope of powers and

functions under the CIPAA. In any challenge against a decision made by an international organisation in the exercise of its functions, the position is that such decision is cloaked with a presumption of legality. In other words, when an international organisation takes action which warrants the assertion that it is appropriate for the fulfilment of one of its organisational purposes and functions, the presumption is that such action is not *ultra vires* the organisation and is thus covered by immunity. The AIAC acted within its scope of functions, as prescribed under the CIPAA, and was therefore immune in the exercise of such functions against any proceedings in respect of the same. (paras 105, 106 & 108)

(3) Parliament had not expressly excluded immunity in respect of judicial review proceedings from the ambit of the First Schedule to the IOPIA. The provision, which has been left ambiguous by Parliament, ought to be construed in a manner which accorded with the State's international law obligations. The immunity conferred under the IOPIA was necessary to ensure the inviolability of the records, documents, archives and general processes of the AIAC. The fact that these appeals concerned judicial review proceedings did not mitigate the effect of the purpose of the immunity granted to the organisation. The risk of jeopardising the independence of the AIAC in the exercise of its functions was the same, notwithstanding whether the proceedings against the institution were of a civil, criminal or public law nature. In *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* ('*Sundra Rajoo*'), the words 'legal process' in the IOPIA were construed to include criminal proceedings. It followed *a fortiori* that the words must also include judicial review proceedings. To read the phrase in any other way would minimise and whittle down the immunity granted under the IOPIA in a manner that Parliament could not have intended. Therefore, the immunity enjoyed by the AIAC in the exercise of its functions, pursuant to the First Schedule to the IOPIA, extended to judicial review proceedings. (paras 115-117)

(4) Aside from the IOPIA, the AIAC is also afforded immunity in the performance of its statutory adjudication functions by s. 34(1) of the CIPAA. The rationale behind the grant of immunity to the AIAC, pursuant to s. 34(1) of the CIPAA, was to enable the institution to carry out its functions as the statutory adjudication authority under the CIPAA in a completely independent manner. This was in line with the purpose of immunity conferred pursuant to the First Schedule to the IOPIA, namely, to protect and preserve the independence of the AIAC in the exercise of its functions, which included its functions under the CIPAA. It followed that the First Schedule to the IOPIA and s. 34(1) of the CIPAA ought to be construed harmoniously so as to give effect to the

purpose and object behind the enactment of both provisions. There is an implicit condition of good faith contained in the IOPIA, requiring the AIAC to fully and efficiently discharge its duties and fulfil its purposes and functions. This, in effect, translated to the functionally restricted nature of immunity conferred on the AIAC, pursuant to the First Schedule to the IOPIA, meaning that the AIAC only enjoyed immunity in the performance of its powers and functions. The good faith qualification in s. 34(1) of the CIPAA does not dilute but rather is consonant with the immunity granted under the First Schedule to the IOPIA. The Court of Appeal: (i) erred in finding that the AIAC did not enjoy immunity under s. 34(1) of the CIPAA in the present case on the grounds that the words 'action' and 'suit' in the said section did not include judicial review proceedings; (ii) failed to construe s. 34(1) of the CIPAA harmoniously with the First Schedule to the IOPIA in order to give effect to the purpose of both provisions, which is to safeguard the independence of the AIAC in the exercise of its functions; and (iii) failed to give due consideration to the decision in *Sundra Rajoo*, which required ambiguous domestic law to be construed in a manner that was consonant with international law. The interpretation accorded to s. 34(1) of the CIPAA by the Court of Appeal risked exposing our country to a violation of international law on immunities and privileges. (paras 118, 120, 126 & 128)

(5) The First Schedule to the IOPIA and s. 34(1) of the CIPAA are not ouster clauses, as characterised by the Court of Appeal, but rather, are immunity clauses. The effect of these provisions is to immunise the AIAC from legal proceedings in the exercise of its functions. Nothing in these provisions purported to exclude the jurisdiction of the High Court to review any act or omission of the AIAC which was not done in good faith in the performance of its functions. (para 152)

(6) Question 1 was answered in the affirmative. The premise of question 2 was misconceived and the court declined to answer the question. Question 3 was answered in the negative. (para 155)

Abu Bakar Jais FCJ (concurring):

(1) Judicial review could be curtailed by legislative intervention and in the present case, that legislative intervention is s. 34(1) of the CIPAA. The words in the provision would mean judicial review could not be taken against the AIAC. The Court of Appeal also decided that in reference to this statutory provision, there was a need for the AIAC to act in good faith in the performance of its function under the CIPAA. Essentially, there is a condition, according to the CIPAA in this provision for the AIAC to act in good faith before it could claim legal immunity and

hence, this legal immunity was not absolute. On the issue of good faith, the reasonings, as explained in the main judgment by Hanipah Farikullah FCJ, was subscribed to and adopted. The AIAC could rely on s. 34(1) of the CIPAA to protect itself as no action or suit shall be instituted or maintained in any court against it or its officers. (paras 177-180)

Bahasa Melayu *Headnotes*

One Amerin Residence Sdn Bhd ('One Amerin') telah melantik Ragawang Corporation Sdn Bhd ('Ragawang') sebagai kontraktor untuk pembinaan Amerin Mall and Residence. Projek tersebut dijalankan dan disempurnakan oleh Ragawang. Satu pertikaian timbul antara pihak-pihak berkenaan bayaran untuk kerja-kerja yang dijalankan. Ragawang memulakan prosiding adjudikasi terhadap One Amerin untuk jumlah RM8,771,124.07 dan membuat permohonan pada Pengarah Pusat Timbang Tara Antarabangsa Asia ('PTTAA') untuk pelantikan adjudikator agar mengadjudikasi tuntutannya. Pengarah PTTAA kemudian melantik seorang adjudikator. One Amerin, walau bagaimanapun, membantah permohonan Ragawang pada Pengarah PTTAA untuk pelantikan seorang adjudikator. PTTAA membalas bahawa pelantikan tersebut sah lalu mengarahkan pihak-pihak membayar cagaran deposit pendahuluan berjumlah RM60,000 dengan pembahagian sama rata. Ragawang mendepositkan setengah bahagian cagaran deposit pendahuluan tersebut tetapi One Amerin enggan berbuat demikian. Adjudikator kemudian meneruskan dan memuktamadkan prosiding adjudikasi. Sementara menunggu keputusan adjudikasi, One Amerin memfailkan permohonan semakan kehakiman berkenaan tindakan-tindakan dan keputusan-keputusan PTTAA yang, menurut One Amerin, adalah haram, tidak sah, menyalahi undang-undang dan tiada kesan undang-undang. PTTAA memohon untuk membatalkan prosiding semakan kehakiman One Amerin. Mahkamah Tinggi membenarkan permohonan pembatalan PTTAA atas alasan PTTAA mempunyai kekebalan, bawah Akta Organisasi Antarabangsa (Keistimewaan dan Kekebalan) 1992 ('AOAKK') dan Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP'), daripada mana-mana prosiding mahkamah, termasuk semakan kehakiman. Susulan rayuan, Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi, dengan memutuskan bahawa: (i) PTTAA berhak menegaskan kekebalannya bawah AOAKK dalam kapasitinya sebagai institusi timbang tara antarabangsa dan bukan dalam kapasitinya sebagai pihak berkuasa berkanun adjudikasi; dan (ii) kekebalan undang-undang yang diberi pada PTTAA, bawah AOAKK dan APAIP, tidak merangkumi prosiding semakan kehakiman. Maka timbul rayuan-rayuan ini. Soalan undang-undang yang timbul adalah: (i) sama ada kekebalan terhadap guaman dan lain-lain proses undang-undang, dalam perenggan 1 Jadual Pertama AOAKK, yang diberi pada PTTAA sebagai

organisasi antarabangsa bawah peraturan-peraturan Pusat Timbang Tara Serantau Kuala Lumpur, terpakai untuk menjadikan PTTAA kebal daripada tindakan-tindakan semakan kehakiman dan keputusan-keputusan yang dibuat oleh PTTAA dalam kapasitinya sebagai pihak berkuasa berkanun dan domestik adjudikasi bawah APAIP ('soalan 1'); (ii) sama ada kuasa-kuasa inheren Mahkamah Tinggi dalam prosiding semakan kehakiman boleh disingkirkan oleh kekebalan yang diberi pada PTTAA, oleh perundangan yang diluluskan oleh Parlimen, iaitu AOAKK dan APAIP ('soalan 2'); dan (iii) sama ada terdapat keperluan untuk menggariskan perbezaan antara kapasiti PTTAA, sama ada sebagai institusi timbang tara antarabangsa atau pihak berkuasa berkanun adjudikasi, sebelum PTTAA berhak menikmati kekebalan yang diberi padanya bawah AOAKK dan APAIP ('soalan 3').

Diputuskan (membenarkan rayuan-rayuan; mengetepikan keputusan Mahkamah Rayuan)

Hanipah Farikullah HMP (menyampaikan penghakiman mahkamah):

(1) Perjanjian negara hos bukanlah dokumen statik tetapi sesuatu yang perlu ditafsir secara dinamik berdasarkan objektif dan matlamat asal sebalik penubuhan PTTAA. Fungsi PTTAA, seperti yang dibayangkan bawah perjanjian negara hos 1981, tidak terhad setakat menjalankan hal-hal perkara timbang tara antarabangsa sahaja tetapi juga meliputi timbang tara domestik. Oleh itu, alasan-alasan yang diguna pakai oleh Mahkamah Rayuan, bahawa kekebalan yang diberi pada PTTAA bawah AOAKK hanya bertujuan merangkumi fungsi-fungsi sifat 'antarabangsa' dan oleh itu, tidak terpakai pada fungsi-fungsi 'domestik' seperti adjudikasi berkanun, tidak boleh dipertahankan. Menyekat kekebalan bawah AOAKK hanya pada situasi apabila tindakan PTTAA dalam kapasitinya sebagai institusi timbang tara antarabangsa, seperti yang dilakukan oleh Mahkamah Rayuan, bermakna organisasi sedemikian tidak akan menikmati kekebalan dalam mana-mana lingkungan besar fungsi-fungsi penyelesaian pertikaian alternatif. Ini mempunyai kesan melumpuhkan fungsi PTTAA. Oleh itu, PTTAA, dalam bertindak sebagai pihak berkuasa berkanun adjudikasi, mempunyai kekebalan bawah AOAKK. Tiada keperluan untuk menggariskan perbezaan antara kapasiti PTTAA, sama ada sebagai institusi timbang tara antarabangsa atau sebagai pihak berkuasa berkanun adjudikasi, sebelum PTTAA boleh menikmati kekebalan yang diperuntukkan buatnya bawah AOAKK.

(2) Permohonan semakan kehakiman yang difailkan oleh One Amerin di Mahkamah Tinggi, yang membentuk hal perkara rayuan-rayuan ini, mencabar keesahan dan keperlembagaan tindakan-tindakan yang dijalankan dan keputusan-keputusan yang dibuat oleh PTTAA dalam penjalanan fungsinya sebagai pihak berkuasa berkanun adjudikasi. Tiada

merit dalam hujahan One Amerin bahawa PTTAA bertindak luar ruang lingkup kuasa-kuasa dan fungsi-fungsinya bawah APAIP. Dalam apa-apa cabaran terhadap keputusan yang dibuat oleh organisasi antarabangsa dalam penjalanan fungsi-fungsinya, kedudukannya adalah keputusan sedemikian diselubungi anggapan keesahan. Dalam kata lain, apabila organisasi antarabangsa mengambil tindakan yang mewajarkan tegasan bahawa sesuai untuk memenuhi salah satu matlamat dan fungsinya, anggapan yang timbul adalah tindakan sedemikian tidak *ultra vires* organisasi tersebut dan, oleh itu, dilindungi oleh kekebalan. PTTAA bertindak dalam ruang lingkup fungsi-fungsinya, seperti yang dinyatakan dalam APAIP, dan ekoran itu, kebal dalam penjalanan fungsi-fungsi sedemikian terhadap mana-mana prosiding berkenaan hal yang sama.

(3) Parlimen tidak, secara nyata, mengecualikan kekebalan dalam prosiding semakan kehakiman daripada lingkungan Jadual Pertama AOAKK. Peruntukan tersebut, yang dibiarkan samar oleh Parlimen, harus ditafsir dengan cara yang selari dengan kewajipan-kewajipan negara bawah undang-undang antarabangsa. Kekebalan yang diberi bawah AOAKK penting untuk memastikan tiada pencabulan rekod-rekod, dokumen-dokumen, arkib-arkib dan proses am PTTAA. Fakta bahawa rayuan-rayuan ini adalah berkenaan prosiding semakan kehakiman tidak mengurangkan kesan tujuan kekebalan diberi pada organisasi tersebut. Risiko membahayakan kebebasan PTTAA, dalam penjalanan fungsi-fungsinya tetap sama, tanpa mengira sama ada prosiding terhadap institusi tersebut bersifat undang-undang sivil, jenayah atau awam. Dalam *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* ('*Sundra Rajoo*'), perkataan-perkataan 'proses undang-undang' dalam AOAKK ditafsir sebagai termasuk prosiding jenayah. Diikuti *a fortiori* bahawa perkataan-perkataan tersebut mestilah termasuk prosiding semakan kehakiman. Membaca ungkapan tersebut dalam apa-apa cara lain akan mengurangkan dan melemahkan kekebalan yang diperuntukkan bawah AOAKK dalam cara yang tidak mungkin diniatkan oleh Parlimen. Oleh itu, kekebalan yang dinikmati oleh PTTAA dalam penjalanan fungsi-fungsinya, bawah Jadual Pertama AOAKK, meliputi prosiding semakan kehakiman.

(4) Selain AOAKK, PTTAA juga diberi kekebalan dalam pelaksanaan fungsi-fungsi berkanun adjudikasi oleh s. 34(1) APAIP. Rasional sebalik peruntukkan kekebalan pada PTTAA, bawah s. 34(1) APAIP, adalah untuk membolehkan institusi ini menjalankan fungsi-fungsinya sebagai pihak berkuasa berkanun adjudikasi bawah APAIP dalam cara yang benar-benar bebas. Ini selaras dengan matlamat kekebalan yang diperuntukkan bawah Jadual Pertama AOAKK, khususnya untuk melindungi dan mengekalkan kebebasan PTTAA dalam penjalanan

fungsi-fungsinya, yang termasuk fungsi-fungsinya bawah APAIP. Berikutan itu, Jadual Pertama AOAKK harus ditafsir secara harmonis untuk memberi kesan pada matlamat dan objektif sebalik penggubalan kedua-dua peruntukan. Terdapat syarat tersirat, iaitu suci hati, yang terkandung dalam AOAKK, yang mensyaratkan agar PTTAA memenuhi kewajipan dan melunaskan matlamat-matlamat dan fungsi-fungsinya sepenuhnya dan dengan efektif. Ini, kesannya, menyorotkan makna sekatan fungsi sifat kekebalan yang diberi pada PTTAA, bawah Jadual Pertama AOAKK, yang bermaksud PTTAA hanya menikmati kekebalan dalam penjalanan kuasa-kuasa dan fungsi-fungsinya. Kelayakan suci hati, bawah s. 34(1) APAIP, tidak melemahkan bahkan sebaliknya sejajar dengan kekebalan yang diberi bawah Jadual Pertama AOAKK. Mahkamah Rayuan: (i) terkhilaf dalam mendapati PTTAA tidak menikmati kekebalan bawah s. 34(1) APAIP dalam kes ini atas alasan perkataan-perkataan 'guaman' dan 'tindakan' dalam seksyen tersebut tidak termasuk prosiding semakan kehakiman; (ii) gagal mentafsir s. 34(1) APAIP secara harmonis dengan Jadual Pertama AOAKK demi memberi kesan pada matlamat kedua-dua peruntukan, iaitu melindungi kebebasan PTTAA dalam penjalanan fungsi-fungsinya; dan (iii) gagal memberi pertimbangan wajar pada keputusan dalam *Sundra Rajoo*, yang berkehendakkan agar undang-undang domestik yang samar ditafsir dalam cara yang selaras dengan undang-undang antarabangsa. Tafsiran yang diberi oleh Mahkamah Rayuan, pada s. 34(1) APAIP, berisiko mendedahkan negara kita pada pencabulan undang-undang antarabangsa berkaitan keistimewaan dan kekebalan.

(5) Jadual Pertama AOAKK dan s. 34(1) APAIP bukan klausa-klausa yang menyingkirkan, seperti yang disifatkan oleh Mahkamah Rayuan, tetapi sebaliknya, adalah klausa-klausa kekebalan. Kesan peruntukan-peruntukan ini adalah untuk memberi kekebalan pada PTTAA daripada prosiding undang-undang dalam penjalanan fungsi-fungsinya. Tiada apa-apa dalam peruntukan-peruntukan ini yang menyingkirkan bidang kuasa Mahkamah Tinggi untuk menyemak apa-apa tindakan atau ketinggalan PTTAA yang tidak dilakukan dengan suci hati dalam pelaksanaan fungsi-fungsinya.

(6) Soalan 1 dijawab secara afirmatif. Landas soalan 2 adalah satu salah tanggapan dan, ekoran itu, mahkamah menolak untuk menjawab soalan tersebut. Soalan 3 dijawab secara negatif.

Abu Bakar Jais HMP (menyokong):

(1) Semakan kehakiman boleh terbatas dengan campur tangan perundangan dan, dalam kes ini, campur tangan perundangan ini termaktub dalam s. 34(1) APAIP. Perkataan-perkataan dalam peruntukan tersebut bermakna semakan kehakiman tidak boleh dimulakan terhadap PTTAA. Mahkamah Rayuan juga memutuskan bahawa, merujuk peruntukan statutori ini, terdapat keperluan untuk PTTAA bertindak secara suci hati dalam pelaksanaan fungsi-fungsinya bawah APAIP. Asasnya, terdapat syarat, menurut APAIP dalam peruntukan ini, agar PTTAA bertindak secara suci hati sebelum boleh menuntut kekebalan bawah undang-undang dan, oleh itu, kekebalan bawah undang-undang ini tidak mutlak. Bersangkutan isu suci hati, alasan-alasan seperti yang dijelaskan dalam penghakiman utama, oleh Hanipah Farikullah HMP, disetujui dan dicedok pakai. PTTAA boleh bersandar pada s. 34(1) APAIP untuk melindungi pusatnya kerana tiada tindakan atau guaman yang boleh dimulakan atau dikekalkan dalam mana-mana mahkamah terhadapnya atau pegawai-pegawainya.

Case(s) referred to:

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(refd)***
Bourgoin SA v. Ministry Of Agriculture, Fisheries And Food [1986] QB 716 ***(refd)***
Chase Oyster Bar v. Hamo Industries [2010] NSWCA 190 ***(refd)***
Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***
Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors [2022] 5 CLJ 1 FC ***(refd)***
Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-kanak & Ors; Majlis Agama Islam Negeri Johor (Intervener) [2020] 4 CLJ 731 FC ***(refd)***
K&J Townmore Construction Limited v. Keogh [2023] IEHC 509 ***(refd)***
Kerajaan Malaysia & Ors v. Nasharuddin Nasir [2004] 1 CLJ 81 FC ***(refd)***
Mega Sasa Sdn Bhd v. Kinta Bakti Sdn Bhd & Ors [2020] 4 CLJ 201 HC ***(refd)***
Melton Medes Ltd And Another v. Securities And Investment Board [1995] 2 WLR 247 ***(refd)***
Nagaenthran Dharmalingam v. PP And Another Appeal [2019] SGCA 37 ***(refd)***
Nivesh Nair Mohan v. Dato' Abdul Razak Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors (Criminal Appeal No. 05(HC)-7-01/2020(W)) (Unreported) ***(refd)***
R (On The Application Of Privacy International) v. Investigatory Powers Tribunal And Others [2019] UKSC 22 ***(refd)***
R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***
Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor And Another Appeal [1998] 3 CLJ 85 FC ***(refd)***
Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199 FC ***(refd)***
Tayler v. LaHatte [2008] NZHC 980 ***(refd)***
Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***
Tenaga Nasional Bhd v. Majlis Daerah Segamat [2022] 2 CLJ 497 FC ***(refd)***
Townsville Hospitals Board v. Townsville City Council [1982] 149 CLR 282 ***(refd)***

Legislation referred to:

Adjudication Rules & Procedure, r. 2

AIAC Adjudication Rules & Procedure, rr. 2, 9(2)(a), (b), Schedule II para 6, Schedule III

Arbitration (Amendment) Act 2018, s. 3

Building and Construction Industry Security of Payment Act 1999, ss. 4, 28(1), 30(2)

Construction Contracts Act 2013, s. 6(14)

Construction Industry Payment and Adjudication Act 2012, ss. 8(1), 15, 16, 19(4), 21(a), (b)(i), 22(1), 27, 32(d), 33, 34(1), (2), 39

Construction Industry Payment and Adjudication Regulations 2014, reg. 8(1)(b)

Federal Constitution, arts. 4(1), 96, 121

International Organizations (Privileges and Immunities) Act 1992, ss. 3(1), 4(1)(a)(i), 11(5), First Schedule para 1, Second Schedule Part II

Interpretation Acts 1948 and 1967, s. 17A

Kuala Lumpur Regional Centre for Arbitration (Privileges & Immunities) Regulations 1996, reg. 3

Rules of Court 2012, O. 12 r. 10(1), O. 15 r. 6(2)(a), O. 29, O. 53 r. 3(5), O. 92 r. 4

Specific Relief Act 1950, s. 54(i)

Building and Construction Industry Security of Payment Act [Sing], ss. 28(1), 32(2)

Building and Construction Industry Security of Payment Act 1999 [Aus], ss. 4, 28(1), 30(2)

Construction Contracts Act 2002 [NZ], ss. 5, 65, 70

Construction Contracts Act 2013 [Ireland], s. 6(14)

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For the 2nd respondent - Siew Suet Mey; M/s Sanjay Mohan

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JUDGMENT

Hanipah Farikullah FCJ:

Introduction

[1] There are two appeals before us. In the first, the appellant is the Asian International Arbitration Centre ('the AIAC'), formerly known as the Kuala Lumpur Regional Centre for Arbitration ('the KLRCA'). The AIAC is an independent and supranational arbitral institution established in 1978 under the auspices of the Asian-African Legal Consultative Organization ('the AALCO').

[2] The first respondent is One Amerin Residence Sdn Bhd ('One Amerin'), and the third respondent is Ragawang Corporation Sdn Bhd ('Ragawang'). One Amerin and Ragawang are both private companies incorporated in Malaysia and were respectively the respondent and the claimant in an adjudication claim commenced by Ragawang against One Amerin pursuant to the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA').

[3] The second respondent, Choon Hon Leng, was the adjudicator appointed by the AIAC for the aforesaid adjudication proceedings under s. 21(b)(i) of the CIPAA. The fourth and fifth respondents are respectively the Minister of Works and the Minister in the Prime Minister's Department (Law).

[4] In the second appeal, the AIAC is also the appellant, while One Amerin is the sole respondent.

[5] The appeals before us concern the extent of immunity enjoyed by an international organisation in Malaysia. More particularly, these appeals raise the issue of whether the legal immunity conferred on the AIAC in its capacity as an international organisation pursuant to the International Organizations (Privileges and Immunities) Act 1992 ('the IOPIA') applies in judicial review proceedings brought against the AIAC in relation to its domestic and statutory functions under the CIPAA.

[6] These appeals arise from a judicial review application filed in the High Court by One Amerin to challenge certain acts carried out by the AIAC in the performance of its functions as the statutory adjudication authority designated under the CIPAA. The High Court struck out the application on the grounds that the AIAC was clothed with immunity under both the IOPIA and the CIPAA from any court proceeding including judicial review. On appeal, the Court of Appeal reversed the decision of the High Court, holding that the AIAC was only entitled to assert immunity pursuant to the IOPIA in its capacity as an international arbitral institution and not in its capacity as the statutory adjudication authority. The Court of Appeal further held that the legal immunity conferred on the AIAC by virtue of both the IOPIA and the CIPAA did not extend to judicial review proceedings.

[7] The matter came up before us on 29 August 2024. At the close of arguments, we reserved our judgment to be given at a later date. We do so now.

Background Facts

[8] The background facts leading to this appeal can be gleaned from the judgments of the courts below, the submissions of the parties and the appeal records. We respectfully adopt the same with some modifications where necessary.

[9] By way of a letter of award dated 8 December 2014, One Amerin appointed Ragawang as the contractor for the construction of Amerin Mall and Residence in Seri Kembangan, Selangor. The project was carried out and completed by Ragawang.

[10] Subsequently, a dispute arose between the parties with regard to the payment for the work done by Ragawang for the project. As a result, Ragawang commenced adjudication proceedings against One Amerin pursuant to the CIPAA by the issuance of a notice of adjudication dated 15 August 2018 for the sum of RM8,771,124.07. The notice of adjudication was duly served on One Amerin on 17 August 2018 pursuant to s. 8(1) of the CIPAA.

[11] Thereafter, Ragawang registered the adjudication proceedings at the AIAC by serving a notice dated 21 August 2018 on the director of the AIAC in accordance with r. 2 of the AIAC Adjudication Rules & Procedure ('the AIAC Rules').

[12] On 12 September 2018, Ragawang submitted a request to the director of the AIAC for the appointment of an adjudicator to adjudicate on its claim pursuant to s. 21(b)(i) of the CIPAA.

[13] On 13 September 2018, the director of the AIAC appointed Choon Hon Leng to act as the adjudicator ('the adjudicator'). The appointment was accepted by the adjudicator on the same day.

[14] By way of letters dated 14 September 2018, One Amerin's solicitors objected to the request made by Ragawang to the director of the AIAC for the appointment of an adjudicator. One Amerin's solicitors also wrote to the adjudicator through a letter dated 19 September 2018 to object to his appointment as adjudicator.

[15] The AIAC responded through a letter dated 19 September 2018 that the appointment of the adjudicator was validly made by the director of the AIAC pursuant to s. 21(b)(i) of the CIPAA.

[16] By way of a letter dated 24 September 2018, the adjudicator agreed with the position taken by the AIAC that his appointment as adjudicator was valid and directed the parties to contribute and deposit with the director of the AIAC a sum to be stated by the AIAC in equal share in advance as security before the date fixed by the AIAC.

[17] Consequently, the AIAC through a notice dated 3 October 2018 instructed the parties to pay an advance security deposit of RM60,600 in equal shares by 8 October 2018. The aforesaid amount comprised the adjudicator's fee in the sum of RM50,000 and the AIAC's administrative fee amounting to RM10,600. The administrative fee of the AIAC was calculated at 20% of the adjudicator's fee plus a 6% Sales and Service Tax (SST) as set out in para. 1.1 of Schedule III to the AIAC Rules.

[18] While Ragawang had duly deposited with the director of the AIAC its half-share of the advance security deposit, One Amerin refused to do so on the basis that it had no obligation to deposit any sum towards the AIAC's administrative fee. One Amerin further took the position that the obligation to deposit any fees and expenses did not arise given that it did not accept the appointment of the adjudicator and the terms thereof. As a result, the adjudicator on 23 October 2018 directed Ragawang to deposit with the director of the AIAC the sum of RM30,300 being One Amerin's portion of the advance security deposit. The payment was duly made by Ragawang on 29 October 2018.

[19] The adjudicator then proceeded and completed the adjudication proceedings. While the adjudication decision was still pending, One Amerin filed the judicial review application that forms the subject matter of these appeals.

The High Court

[20] On 7 November 2018, One Amerin filed an application for leave to commence judicial review proceedings in the High Court against the respondents in the first appeal herein ('One Amerin's leave application') seeking, *inter alia*, the following reliefs:

(i) an order of *certiorari* to quash the decision of the AIAC to appoint the adjudicator to act as the adjudicator for the adjudication initiated by Ragawang;

(ii) a declaration that the appointment of the adjudicator was *ultra vires* the CIPAA and was illegal, invalid, unlawful and of no effect in law;

(iii) a declaration that the AIAC Rules were illegal, invalid, unlawful and of no effect in law for having been made without any authority in law;

(iv) a declaration that the notice dated 3 October 2018 issued by the AIAC compelling One Amerin and Ragawang to deposit the full sum of the adjudicator's fee with the AIAC was illegal, unlawful, invalid and of no effect in law;

(v) a declaration that the notice dated 3 October 2018 issued by the AIAC compelling One Amerin and Ragawang to deposit the AIAC's administrative fee with the AIAC was illegal, unlawful, invalid and of no effect in law; and

(vi) a declaration that the AIAC Rules by which the AIAC charges, *inter alia*, an administrative fee at the rate of 20% of the adjudicator's fee were unconstitutional as well as illegal, unlawful, invalid and of no effect in law.

[21] The application for judicial review filed by One Amerin was premised on four grounds:

(i) firstly, the AIAC's appointment of the adjudicator was in contravention of ss. 21 and 22 of the CIPAA. Section 21(a) of the CIPAA provides that an adjudicator may be appointed by agreement of the parties within ten working days from the service of the notice of adjudication, while s. 22(1) of the CIPAA requires the claimant to notify the adjudicator to be appointed under s. 21(a) in writing. When ss. 21(a) and 22(1) of the CIPAA were read harmoniously, the claimant was obligated to nominate an adjudicator for the respondent's consideration and notify the adjudicator of his appointment. Ragawang had failed to comply with these statutory requirements before making a request to the AIAC to appoint an adjudicator pursuant to s. 21(b)(i) of the CIPAA. In the circumstances, the AIAC's decision to appoint the adjudicator was unlawfully made;

(ii) secondly, the AIAC Rules were made by the AIAC without any authority in law. The power to make regulations under the CIPAA is expressly conferred by s. 39 of the CIPAA on the Minister of Works. No such power was conferred on the AIAC under the CIPAA;

(iii) thirdly, the AIAC Rules were *ultra vires* the CIPAA and the Construction Industry Payment and Adjudication Regulations 2014 ('the CIPAA Regulations'):

(a) rule 9(2)(a) of the AIAC Rules requires an adjudicator to issue a direction ordering the parties to deposit with the AIAC the full adjudicator's fees and estimated expenses. This was in contravention of s. 19(4) of the CIPAA, which only provides for a deposit of a reasonable proportion of the adjudicator's fees, and reg. 8(1)(b) of the CIPAA Regulations, which requires the adjudicator to submit to the AIAC a copy of his direction to the parties to deposit only a proportion of the adjudicator's fees in advance as security;

(b) schedule II to the AIAC Rules enlarged the limits of s. 34 of the CIPAA. Firstly, s. 34(2) of the CIPAA provides that an adjudicator cannot be compelled to give evidence in any arbitration or court proceedings in connection with the dispute that he has adjudicated. However, para. 4 of Schedule II to the AIAC Rules had extended the non-compellability of the adjudicator in relation to a dispute referred to him and not merely adjudicated by him. Secondly, s. 34(1) of the CIPAA stipulates that "no action or suit" shall be maintained or instituted against an adjudicator. Nonetheless, para. 6 of Schedule II to the AIAC Rules had extended the immunity of the adjudicator to include "other legal proceedings";

(c) Schedule III to the AIAC Rules authorises the AIAC to charge an administrative fee calculated at 20% of the adjudicator's fee. However, both the CIPAA and the CIPAA Regulations did not provide for the imposition or charging of any administrative fee by the AIAC. As such, the administrative fee imposed by the AIAC under Schedule III to the AIAC Rules was *ultra vires* the CIPAA and the CIPAA Regulations;

(iv) fourthly, the administrative fee imposed by the AIAC was unconstitutional. The administrative fee charged by the AIAC was a tax levied without any authority of law in contravention of art. 96 of the Federal Constitution.

[22] In essence, the acts and decisions of the AIAC that were sought to be impugned through the judicial review application as set out above were matters concerning the functions of the AIAC as the statutory adjudication authority under the CIPAA.

[23] At the same time, One Amerin sought a stay of the adjudication proceedings initiated by Ragawang pending the disposal of its judicial review application pursuant to O. 53 r. 3(5) of the Rules of Court 2012 ('One Amerin's stay application'). Furthermore, One Amerin also filed an application for injunction pursuant to O. 29 of the Rules of Court 2012 to restrain the adjudicator from delivering the adjudication decision and to restrain Ragawang from enforcing any adjudication decision delivered by the adjudicator until the disposal of the judicial review application ('One Amerin's injunction application').

[24] On 15 November 2018, the High Court granted an *ad interim* injunction as applied for by One Amerin pending the hearing of One Amerin's leave application, stay application and injunction application.

[25] On 29 November 2018, the High Court allowed One Amerin's leave application, but dismissed both its stay application and injunction application. The High Court nonetheless granted an *ad interim* injunction

until the date of hearing of One Amerin's application for an interim stay and an interim injunction pending its appeal to the Court of Appeal against the decision of the High Court in respect of its stay application and injunction application.

[26] One Amerin's injunction application was dismissed by the High Court on the following grounds:

(i) the appointment of the adjudicator by the director of the AIAC was lawfully made in accordance with s. 21(b)(i) of the CIPAA as there was no agreement between the parties to appoint an adjudicator within ten working days from the service of the notice of adjudication. One Amerin's contention that Ragawang was obligated to nominate an adjudicator pursuant to s. 22(1) of the CIPAA was misplaced;

(ii) the direction given by the adjudicator for the parties to make payment of the AIAC's administrative fee was pursuant to r. 9(2)(a) and (b) of the AIAC Rules;

(iii) under s. 27 of the CIPAA, the adjudicator may proceed and complete the adjudication proceedings notwithstanding any jurisdictional challenge made against him. This provision clearly showed the intention of the Legislature for the adjudication process to be carried out smoothly and swiftly without any impediment;

(iv) there is a strong presumption in favour of the constitutionality of provisions in a statute and the regulations enacted thereunder. A mere challenge against the constitutionality of a statute, which can easily be mounted in many cases, should not be the paramount consideration to determine whether there exists a serious issue to be tried in obtaining an injunction order;

(v) section 34(1) of the CIPAA provides legal immunity to the AIAC and the adjudicator from any action or suit in court. The word "action" under s. 34(1) is wide and covers a judicial review application. As such, the AIAC and the adjudicator were clothed with legal immunity;

(vi) in the circumstances, there was no serious issue to be tried in the case;

(vii) the balance of convenience lied in favour of the respondents. This was because One Amerin had the right to set aside the adjudication decision pursuant to s. 15 of the CIPAA. Hence, One Amerin would not be prejudiced if the injunction was not allowed. Conversely, if the injunction was allowed, the adjudicator would be unable to perform his statutory duty and issue his adjudication decision within the timeframe stipulated under the CIPAA, rendering the adjudication decision void and causing hardship to Ragawang whom had spent time, monies and efforts to resolve the dispute;

(viii) section 15 of the CIPAA, which provides the right to set aside the adjudication decision, was an equally efficacious relief for One Amerin. Therefore, s. 54(i) of the Specific Relief Act 1950 applied in this case, and One Amerin's injunction application should not be granted; and

(ix) damages will be an adequate remedy if the adjudication decision was issued as the decision would only relate to the payment of monies.

[27] For the above reasons, the High Court also held that the judicial review application would not be rendered nugatory if a stay was not granted and accordingly dismissed One Amerin's stay application.

[28] On 30 November 2018, the AIAC was served with the cause papers in respect of One Amerin's judicial review application. Subsequently, the AIAC was requested by letter to attend court on 10 December 2018.

[29] The AIAC then appointed counsel who appeared before the High Court on 10 December 2018 and stated that their appearance was without prejudice to the AIAC's immunities and privileges particularly in its capacity as an international organisation. The counsel for the AIAC further informed the Court that the AIAC would be making an application to strike out the judicial review proceedings filed against the AIAC in consequence.

[30] On the same day, the High Court dismissed the application filed by One Amerin for an interim stay and an interim injunction pending its appeal to the Court of Appeal against the High Court's dismissal of its stay application and injunction application.

[31] On 14 December 2018, the AIAC filed an application pursuant to O. 12 r. 10(1), O. 15 r. 6(2)(a) and O. 92 r. 4 of the Rules of Court 2012 ('the AIAC's striking out application') seeking, *inter alia*, the following reliefs:

(i) an order to strike out the judicial review application filed by One Amerin against the AIAC;

(ii) an order that the AIAC ceases to be a party to the judicial review application;

(iii) an order to set aside the leave granted to One Amerin to commence judicial review proceedings against, *inter alia*, the AIAC; and

(iv) a declaration that the court has no jurisdiction over the AIAC in respect of the claims, reliefs and remedies sought by One Amerin in the judicial review application.

[32] The AIAC's striking out application was premised on two grounds: first, the AIAC was an international organisation which was conferred immunity from any court proceedings pursuant to the IOPIA; and second, the AIAC was also afforded immunity from any court proceedings under s. 34 of the CIPAA. On that basis, the AIAC argued that it cannot be made a party to One Amerin's judicial review application.

[33] On 25 April 2019, the High Court allowed the AIAC's striking out application on the following grounds:

(i) the AIAC was entitled to apply to the court to set aside the order granting leave to One Amerin to commence judicial review proceedings as the leave application was heard *ex parte* in the absence of the AIAC;

(ii) the IOPIA empowers the Minister of Foreign Affairs to enact regulations in relation to the privileges and immunities of international organisations;

(iii) the AIAC, which was previously known as the KLRCA, was declared by the Minister of Foreign Affairs pursuant to the Kuala Lumpur Regional Centre for Arbitration (Privileges & Immunities) Regulations 1996 ('the KLRCA Regulations') as an international organisation having the immunities specified in the First Schedule to the IOPIA;

(iv) the First Schedule to the IOPIA confers immunity on the AIAC in its capacity as an international organisation from suit and from other legal process;

(v) the words "suit and "legal process" have wide meanings, which include judicial review proceedings;

(vi) there was no qualification attached to the immunities and privileges conferred on the AIAC under the IOPIA and the First Schedule to the IOPIA. Thus, One Amerin's contention that the immunities under the First Schedule to the IOPIA only apply when the AIAC functions as an international arbitral institution and not when it functions as an adjudication authority under the CIPAA was devoid of merit; and

(vii) Section 34(1) of the CIPAA also confers immunity on the AIAC. The words "suit' and "action" in s. 34(1) are wide enough to cover a judicial review application.

[34] Based on the above reasons, the High Court concluded that the AIAC was clothed with the immunities provided for under the IOPIA and the First Schedule to the IOPIA as well as s. 34(1) of the CIPAA from any court proceedings including One Amerin's judicial review application. The High Court accordingly allowed the AIAC's striking out application.

The Court Of Appeal

[35] On 3 December 2018, One Amerin appealed to the Court of Appeal against the decision of the High Court dated 29 November 2018 which dismissed its stay application ('One Amerin's stay appeal') and injunction application ('One Amerin's injunction appeal').

[36] The Court of Appeal on 14 December 2018 granted an *ad interim* stay and an *ad interim* injunction as applied for by One Amerin pending the disposal of its stay appeal and injunction appeal.

[37] On 18 December 2018, the AIAC filed a motion in respect of One Amerin's stay appeal ('the AIAC's motion to strike out One Amerin's stay appeal') seeking, *inter alia*, the following reliefs:

(i) an order to strike out One Amerin's stay appeal and any interlocutory application filed therein as against the AIAC;

(ii) an order that the AIAC ceases to be a party to One Amerin's stay appeal; and

(iii) a declaration that the court has no jurisdiction over the AIAC in respect of the claims, reliefs and remedies sought in One Amerin's stay appeal.

[38] Thereafter, One Amerin on 26 April 2019 appealed to the Court of Appeal against the decision of the High Court dated 25 April 2019 which allowed the AIAC's striking out application ('One Amerin's striking out appeal').

[39] Both One Amerin's striking out appeal and the AIAC's motion to strike out One Amerin's stay appeal were heard together before the Court of Appeal. On 25 January 2022, the Court of Appeal unanimously allowed One Amerin's striking out appeal and dismissed the AIAC's motion to strike out One Amerin's stay appeal based on the following grounds:

(i) the AIAC's argument that One Amerin cannot commence judicial review proceedings against the AIAC by virtue of the protection, privileges and immunities awarded to the AIAC pursuant to s. 4 of the IOPIA and the First Schedule to the IOPIA, read together with reg. 3 of the KLRCA Regulations, could not be accepted;

(ii) the learned High Court Judge erred in failing to consider s. 11(5) of the IOPIA subject to which the KLRCA Regulations cannot confer on the AIAC any privileges or immunities greater in extent than those which at the time of the making of the regulations were or were required to be conferred on the AIAC in order to give effect to any international agreement in that behalf;

(iii) by virtue of s. 11(5) of the IOPIA, the immunities provided under the First Schedule to the IOPIA did not apply in the judicial review proceedings commenced by One Amerin which relate to the acts of the AIAC in its capacity as the statutory adjudication authority and not as an institution which promotes and facilitates arbitration;

(iv) the immunity enjoyed by the AIAC pursuant to the IOPIA was not absolute, but was restricted to acts carried out by the AIAC in the exercise of its functions as mandated under international agreements;

(v) by way of reference to the United Kingdom Supreme Court case of *R (On The Application Of Privacy International) v. Investigatory Powers Tribunal And Others* [2019] UKSC 22; [2020] AC 491, there was a common law presumption against the ousting of the jurisdiction of the High Court;

(vi) the AIAC cannot be accorded special privileges and immunities unless it clearly appears that it was the intention of the Legislature to confer them, citing the decision of the High Court of Australia in *Townsville Hospitals Board v. Townsville City Council* [1982] 149 CLR 282;

(vii) as stated by the Federal Court in *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81, judicial review can only be excluded by legislation if the words used are "unmistakably explicit". In the absence of a clear statutory provision to that effect, the AIAC was not immune from judicial review proceedings;

(viii) the immunity afforded to the AIAC under s. 34(1) of the CIPAA was not absolute given that One Amerin can institute an action or a suit against the AIAC if it can be shown that an act or omission of the AIAC was not done in good faith; and

(ix) The words "from suit and from other legal process" in the First Schedule to the IOPIA and the words "action or suit" in s. 34(1) of the CIPAA did not include judicial review proceedings.

[40] For the above reasons, the Court of Appeal found that there was merit in One Amerin's striking out appeal, thus allowing the same and setting aside the decision of the High Court in respect of the AIAC's striking out application. Conversely, the Court of Appeal found no merit in the AIAC's motion to strike out One Amerin's stay appeal and accordingly dismissed the same.

[41] Dissatisfied with the decision of the Court of Appeal, the AIAC sought leave to appeal to the Federal Court. On 30 November 2023, leave was granted in respect of the following questions of law:

(i) whether the immunity from suit and from other legal process in para. 1 of the First Schedule to the IOPIA conferred upon the AIAC as an international organisation under the KLRCA Regulations is

applicable to render the AIAC immune from judicial review of acts and decisions made by the AIAC in its capacity as the domestic and statutory adjudication authority under the CIPAA;

(i) whether the High Court's inherent powers in judicial review proceedings can be ousted by the immunity conferred on the AIAC by virtue of legislations passed by Parliament, *ie*, the IOPIA and the CIPAA; and

(ii) whether there is a necessity to draw a distinction on the capacity of the AIAC either as an international arbitral institution or the statutory adjudication authority before the AIAC is entitled to enjoy the immunity conferred under the IOPIA and the CIPAA.

The AIAC'S Submissions

[42] Learned counsel for the AIAC submitted that the AIAC is conferred immunity from legal process and proceedings pursuant to the IOPIA. In this regard, it was submitted that the AIAC is an international organisation by virtue of s. 3 of the IOPIA and the KLRCA Regulations, and is therefore awarded the protection, privileges and immunities provided under s. 4 of the IOPIA and the First Schedule to the IOPIA.

[43] Learned counsel highlighted that s. 4(1) of the IOPIA empowers the Minister of Foreign Affairs to confer immunity on an international organisation subject to conditions. It was argued that if indeed the immunity conferred on the AIAC pursuant to the IOPIA was not intended to cover its role under the CIPAA or in domestic proceedings, the same would have been expressly stated in the KLRCA Regulations. In the absence of such an express condition, learned counsel submitted that the AIAC enjoys absolute immunity pursuant to the IOPIA.

[44] Flowing from the above, it was submitted that there is no necessity to make a distinction on the capacity of the AIAC either as an international arbitral institution or the statutory adjudication authority before it is entitled to enjoy the immunity conferred pursuant to the IOPIA. Learned counsel contended that the functions of the AIAC are not limited to arbitration only, and the AIAC in acting as the adjudication authority is thus accorded immunity under both the IOPIA and the CIPAA.

[45] It was further argued that there is a distinction between the immunity enjoyed by the AIAC and the ousting of the jurisdiction of the courts by statutory provisions on the basis that the former emanates from international agreements. Learned counsel maintained that the host country agreements between the Government of Malaysia and the AALCO require the Government to respect the independence of the AIAC and the inviolability of its property, assets and archives.

[46] It was also submitted that the words "suit", "other legal process" and "action" in the First Schedule to the IOPIA and s. 34(1) of the CIPAA are wide enough to include judicial review proceedings. Such a construction, according to learned counsel, is in line with the Government's obligations in international law, and to read the material provisions under the IOPIA in any other way would amount to sidestepping the inviolability of the AIAC's archives and documents as well as defeating the purpose of the immunity accorded to the AIAC under the IOPIA.

[47] In any event, learned counsel for the AIAC asserted that the steps undertaken by the AIAC in the present case are deemed to have been undertaken in good faith pursuant to s. 34(1) of the CIPAA as these were done in accordance with the provisions of the CIPAA and the regulations made thereunder. Learned counsel argued that One Amerin bears the onus to rebut this presumption and show that the AIAC has not acted in good faith in performing its functions. It was submitted that One Amerin has failed to do so.

[48] Learned counsel for the AIAC further submitted that ss. 15 and 16 of the CIPAA are adequate remedies for any party who wishes to challenge the appropriateness of the appointment of an adjudicator, the fees of the AIAC and the actions of the adjudicator. It was emphasised that the remedy of judicial review could only be exercised in very exceptional circumstances when an alternative remedy exists. Learned counsel thus submitted that judicial review ought not be allowed against the AIAC in the present case.

One Amerin's Submissions

[49] On the other hand, learned counsel for One Amerin submitted that para. 1 of the First Schedule to the IOPIA, when read together with s. 11(5) of the IOPIA, gives rise to the construction that the immunity conferred under the IOPIA is restricted to situations where the AIAC functions as an international arbitral institution and has no application in relation to its function as the domestic and statutory adjudication authority.

[50] Learned counsel relied on s. 11(5) of the IOPIA to argue that an international organisation is only granted immunity to the extent necessary for carrying out its functions as mandated under any relevant international agreement. In other words, it was argued that s. 11(5) demonstrates Parliament's intention to confer functional immunity and not absolute immunity on international organisations.

[51] In respect of the above, learned counsel for One Amerin submitted that the acts and decisions of the AIAC in its capacity as the domestic and statutory adjudication authority under the CIPAA have no close, direct and necessary connection with the objectives and functions outlined under the host country agreements entered into between the Government of Malaysia

and the AALCO in 1981 and 1989. It was argued that the host country agreements only provide for the functions of the AIAC as an institution to promote and facilitate arbitration and make no mention of its role as the statutory adjudication authority. Learned counsel further highlighted that the CIPAA had not been enacted when the AIAC was conferred immunity pursuant to the IOPIA by way of the KLRCA Regulations in 1996. It was, therefore, submitted that the immunity accorded under the IOPIA cannot be extended to the AIAC's statutory adjudication functions as that would amount to conferring on the AIAC greater immunity than that provided under the host country agreements in contravention of s. 11(5) of the IOPIA.

[52] Learned counsel for One Amerin also asserted that the court's judicial review powers over the domestic statutory functions of the AIAC pursuant to the CIPAA cannot be ousted by way of immunity conferred under the IOPIA. It was argued that a statutory provision ought not be read as ousting judicial review unless clear and unmistakably explicit words were used by Parliament to that effect. Learned counsel pointed out that the IOPIA contains no such express words to exclude the AIAC's functions under the CIPAA from judicial review.

[53] Furthermore, according to learned counsel, the fact that Parliament had enacted s. 34(1) of the CIPAA to specifically accord immunity to the AIAC in the exercise of its functions as the statutory adjudication authority means that the immunity conferred under the IOPIA is not intended to cover those functions. Otherwise, s. 34(1) of the CIPAA will be a provision enacted in vain.

[54] It was also contended that s. 34(1) of the CIPAA is not applicable to judicial review proceedings because judicial review is a special procedure that is not an "action" or a "suit" barred by s. 34(1). It was further submitted that even if judicial review is an action or a suit as defined under s. 34(1), the AIAC cannot be accorded immunity under the provision in the present case as its acts and decisions are *ultra vires* the CIPAA and thus, are not done in good faith in the performance of its functions under the CIPAA.

[55] Moreover, it was submitted that a material factor in determining whether immunity should be granted to the AIAC is whether a reasonable alternative remedy is available for One Amerin to effectively protect its rights. Learned counsel argued that ss. 15 and 16 of the CIPAA are not the operative remedies for the issues raised by One Amerin in its judicial review application which relate to the legality and constitutionality of the acts and decisions of the AIAC. On that basis, it was submitted that the AIAC should not be granted immunity in the present case where there is no alternative avenue for One Amerin to seek redress on matters concerning public and constitutional law other than by way of judicial review.

A

Our Analysis And Findings

[56] The central issue that arises for our determination in these appeals is whether the AIAC is immune from judicial review proceedings brought by One Amerin in relation to its functions as the statutory adjudication authority. Before we embark on our analysis of this issue, it is important to
B appreciate the history behind how the AIAC came to be established and conferred with immunity under legislation in Malaysia.

The Historical Background Of The AIAC

[57] The historical background of the AIAC has been comprehensively set
C out by Datuk Professor Sundra Rajoo in '*Asian International Arbitration Centre (AIAC) – Transformation, Growth and Prospects*' [2020] 4 MLJ i. We would summarise it as follow, with some modification.

[58] The AIAC was formerly known as the KLRCA. It was renamed as the AIAC in 2018 pursuant to the Arbitration (Amendment) Act 2018
D ('the Amendment Act') by way of s. 3 which provides that all references to the KLRCA in any written law or document subsisting before the coming into force of the Amendment Act is to be construed as a reference to the AIAC and that all acts, directions and decisions that had been done, given or made by the KLRCA prior to the Amendment Act will continue to remain
E in full force and effect unless otherwise amended or revoked.

[59] As stated at the outset of this judgment, the AIAC was established in 1978 as an independent and supranational arbitral institution under the auspices of the then Asian-African Legal Consultative Committee, now known as the AALCO. It is headed by a director who reports directly to the
F Secretary-General of the AALCO.

[60] The AALCO was formed in 1956 as the outcome of the Bandung Conference, which hosted representatives from 29 Asian and African nations. Malaysia became a member of the AALCO in 1970. The organisation presently has 49 countries as its members, comprising almost all
G the States from Asia and Africa.

[61] The AALCO initially served as an advisory board to Member States on matters relating to international law. It later assumed the role of assisting Member States in drafting constitutions, model legislation and bilateral
H agreements upon request. It also provided expertise and assisted Member States in the appointment of arbitrators and other matters relating to arbitral proceedings as well as capacity-building in alternative dispute resolution ('ADR') and training of arbitrators in its regional centres.

I

[62] In 1978, the AALCO launched its Integrated Scheme for Settlement of Disputes in the Economic and Commercial Transactions. The scheme envisaged, *inter alia*, the establishment of a network of regional centres for arbitration functioning under the auspices of the AALCO in different parts of Asia and Africa so that the flow of arbitration cases to arbitral institutions outside the Afro-Asian region could be minimised. It was envisioned that these regional arbitration centres would form viable alternatives to the traditional institutions in the West in order to promote the development of the Afro-Asian region.

[63] The AIAC was the first such regional centre established under the AALCO in Kuala Lumpur, Malaysia. Thereafter, other regional centres were set up in Cairo (the Arab Republic of Egypt), Lagos (Nigeria), Tehran (the Islamic Republic of Iran) and Nairobi (the Republic of Kenya).

[64] The establishment of the AIAC was formalised under a host country agreement between the AALCO and the Government of Malaysia in 1981. Further host country agreements were entered into between the AALCO and the Government of Malaysia in 1989, 2004, 2013 and 2023 to formalise and reinforce the continued functioning of the AIAC in Kuala Lumpur.

[65] In pursuance of the above host country agreements, the Government of Malaysia has guaranteed the independent functioning of the AIAC and the inviolability of its premises and archives. The AIAC is, therefore, accorded with certain privileges and immunities pursuant to the IOPIA for the purposes of executing its functions as an independent international organisation.

The Material Provisions Under The IOPIA

[66] The relevant provisions under the IOPIA which are material to the question of the AIAC's legal immunity are reproduced below.

> Section 3
>
> (1) The Minister may by regulations declare an organization:
>
> (a) of which Malaysia and a country or countries other than Malaysia are members;
>
> (b) that is constituted by a person or persons representing Malaysia and a person or persons representing a country or countries other than Malaysia; or
>
> (c) which has an office in Malaysia and which, in the opinion of the Minister, performs functions that would be beneficial to Malaysia,
>
> to be an international organization.
>
> ...

Section 4

(1) Subject to this section, and to subsections 11(3), 11(4) and 11(5), the Minister may by regulations either with or without restrictions or to the extent or subject to the conditions prescribed in such regulations:

(a) confer upon an international organization-

(i) juridical personality and such legal capacities as are necessary for the exercise of the powers and the performance of the functions of the organization; and

(ii) all or any of the privileges and immunities specified in the First Schedule;

...

FIRST SCHEDULE

[Section 4]

PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATION

1. Immunity of the organization, and of the property and assets of, or in the custody of, or administered by, the organization, from suit and from other legal process.

...

(emphasis added)

[67] In exercise of the powers conferred by ss. 3(1) and 4(1) of the IOPIA, the Minister of Foreign Affairs prescribed the KLRCA Regulations, whereby reg. 2 declares the AIAC as an international organisation while reg. 3 confers privileges and immunities on the AIAC as per the First Schedule to the IOPIA. Regulation 3 is reproduced herein for ease of reference.

The Centre shall have juridical personality and such legal capacities as are necessary for the exercise of its powers and the performance of its functions and **shall also have the privileges and immunities specified in the First Schedule to the Act**.

(emphasis added)

[68] In essence, the AIAC claims that its legal immunity is derived from the First Schedule to the IOPIA, namely, immunity from suit and from other legal process. Relying on this provision, the AIAC asserts that it enjoys absolute immunity from the jurisdiction of the Malaysian courts.

[69] On the contrary, One Amerin argues that the First Schedule to the IOPIA confers functional immunity on the AIAC, and the same only applies in relation to the AIAC's functions as an international arbitral institution and not in respect of its statutory functions under domestic law, namely, the CIPAA.

The Scope Of Immunity Conferred On The AIAC Under The IOPIA

[70] It is a well-established principle of public international law that an international organisation is entitled to those privileges and immunities it needs for the effective exercise of its functions. As such, the immunity accorded to an international organisation is premised on the concept of 'functional necessity', that is, such immunity only applies to those acts which are deemed necessary for the organisation to carry out its functions. The functional basis of the immunity enjoyed by an international organisation is explained by Chittharanjan Felix Amerasinghe in *Principles of the Institutional Law of International Organizations* (Cambridge University Press, 2006) at p. 316:

> International organizations enjoy privileges and immunities entirely because they are necessary for the fulfilment of their purposes and functions.

[71] The rationale behind the grant of immunity to an international organisation on functional grounds is to preserve and ensure the independence of the organisation, and to enable it to fulfill its functions which could otherwise be compromised by unwarranted interference from the host State.

[72] In practice, however, the concept of functional immunity frequently leads to *de facto* absolute immunity. The absolute nature of the immunity granted to an international organisation within its scope of functions is elucidated by Dr Eric De Brabandere in *'Immunity of International Organizations in Post-conflict International Administrations'* (2010) 7 IOLR 79:

> The reasons behind the absolute character of international organisation immunity are twofold. First, if ... one takes an approach to functionality as the foundation of immunity, namely to allow the organisation to function properly, the only result can be to give the organisations full immunity from the jurisdiction of national courts and tribunals. The opposite would clearly compromise the independence of the organisation if it could be subjected to pressure for (*sic*) the official (judicial) institutions of the host state. ...
>
> Secondly, if functionality is viewed as a principle 'limiting' immunity to those activities conducted in an official capacity, then one can only but conclude that all acts of an international organisation are by definition 'official acts' of the organisations (*sic*) to which functional immunity extends. Indeed, an international organisation's activity is limited by its functional personality and thus by the function assigned to it by the States, partially extended with implied powers. All acts of an international organisation are thus official acts; all other acts being *ultra vires*, in which case immunity will not be applicable.

[73] Given that international organisations possess different functions, they would, in principle, require different privileges and immunities. The relevant laws on such privileges and immunities arise from any agreement concluded between the organisation and its host State as well as the national laws of that State.

[74] Generally, the host State agrees with the international organisation on the type or nature of immunities that the organisation will enjoy in the host State's territory. The host State will then establish through legislation the scope of the immunities to be recognised by its national courts. Jurisdictional immunities are granted to the international organisation as such and cover the acts it performs in furtherance of its object and purpose.

[75] As stated earlier, the AIAC was established pursuant to a host country agreement entered into between the AALCO and the Government of Malaysia. The 1981 host country agreement explicitly grants the AIAC such privileges and immunities as may be necessary for the organisation to execute its functions. In other words, the immunity granted to the AIAC under the host country agreement is of a functional character. This is spelt out in cl. 7 of the agreement, which reads as follows:

> Independence Of The Centre
>
> (a) The Government of Malaysia shall guarantee that the Centre shall function independently.
>
> (b) **The Centre shall enjoy such privileges and immunities as may be necessary for the purposes of executing its functions including immunity from judicial processes,** inviolability of premises and its archives.
>
> (emphasis added)

[76] The host country agreement is an international agreement governed by international law. However, the dualist nature of the Malaysian legal framework means that international law does not form part of Malaysian law unless expressly domesticated by Parliament (see, for example: *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766; [2011] 6 MLJ 297). In this context, the IOPIA was enacted by Parliament to give effect to the host country agreement.

[77] Section 4(1) of the IOPIA and the First Schedule to the IOPIA, read together with reg. 3 of the KLRCA Regulations, confers immunity from suit and from other legal process on the AIAC. Section 11(5) of the IOPIA further provides as follows:

> Regulations made under section 4, 5, 6A or 6B shall not confer on any person or organisation any privileges or immunities greater in extent than those which at the time of the making of the regulations are or are required to be conferred on that person or organization in order to give effect to any international agreement in that behalf.

[78] It is clear from s. 11(5) of the IOPIA that the AIAC is granted immunity pursuant to the IOPIA only to the extent necessary to give effect to the host country agreement.

[79] The wording of the First Schedule to the IOPIA provides for a broad immunity standard without making any reference to the AIAC's functions. A plain reading of the provision indicates the grant of an unqualified, hence absolute, immunity to the AIAC. However, as made clear by s. 11(5) of the IOPIA, the immunity given to the AIAC pursuant to the IOPIA must be read subject to the provisions of the host country agreement.

[80] As mentioned earlier, cl. 7 of the 1981 host country agreement explicitly speaks of functional immunity. This, in our view, describes the nature of the immunity accorded to the AIAC, while the First Schedule to the IOPIA, which provides for a general and unqualified immunity, defines the scope of the immunity enjoyed by the AIAC. To put simply, the immunity of the AIAC, within the framework of its functional restrictions, is to be regarded in principle as absolute under the IOPIA.

[81] This construction is bolstered by s. 4(1)(a)(i) of the IOPIA, which functionally limits the juridical personality and legal capacities of an international organisation. If the AIAC enjoys legal personality only to the extent required to perform its functions, it is legally unable to act beyond its functional personality. Any act not covered by such a limited personality are *ultra vires*. This necessarily means that the AIAC in principle has absolute immunity within the confines of its functionally limited personality.

The Statutory Adjudication Functions Of The AIAC

[82] Having established the fundamentally functional nature of the immunity enjoyed by the AIAC under the IOPIA, we move on to consider whether the functions of the AIAC as the statutory adjudication authority pursuant to the CIPAA are covered by the immunity provided under the First Schedule to the IOPIA.

[83] The enactment of the CIPAA was predicated on the objective of alleviating payment problems that prevailed and stifled cash flow in the construction industry by providing a speedy mechanism for settling payment issues arising out of construction contracts through adjudication

(see: Foo Joon Liang and Leong Hong Kit, '*Statutory Adjudication*' in Lim Chong Fong (ed), *Law and Practice of Construction Law in Malaysia* (Sweet & Maxwell, 2021) at para. [15.002]).

[84] Prior to the enactment of the CIPAA, there had been long existing cash flow problems in the construction industry in Malaysia arising from delayed payments, non-payments and under-certification of value of work done. It

was recognised that delays in payment could potentially lead to delays in the completion of projects, thus affecting the credibility of the construction industry in our nation.

[85] After much debate and discussion involving the relevant governmental bodies, professional organisations and various stakeholders in the construction industry, the Construction Industry Payment and Adjudication Bill was finalised and tabled in Parliament in December 2011, and passed in June 2012. The CIPAA eventually came into force on 15 April 2014. The CIPAA Regulations, the AIAC Rules and the Construction Industry Payment and Adjudication (Exemption) Order 2014 were also implemented along with the CIPAA.

[86] The AIAC is the designated adjudication authority under s. 32 of the CIPAA. It is responsible for the setting of competency standards and criteria of an adjudicator, determination of the standard terms of appointment of an adjudicator and fees for the services of an adjudicator, administrative support for the conduct of adjudication under the CIPAA and any functions as may be required for the efficient conduct of adjudication under the CIPAA.

[87] The Court of Appeal below was of the view that, the immunity conferred on the AIAC pursuant to the First Schedule to the IOPIA, did not apply to acts carried out by the AIAC in its capacity as the statutory adjudication authority. Premised on s. 11(5) of the IOPIA, the Court of Appeal reasoned that the host country agreement in existence at the time of the making of the KLRCA Regulations did not envisage the AIAC's statutory adjudication functions under the CIPAA.

[88] The objectives and functions of the AIAC as outlined in the 1981 host country agreement are as follows:

> **Objectives**
>
> The objects of establishing the Centre are as follows:
>
> (a) To act as a co-ordinating agency in the Asian-African Legal Consultative Committee's (A.A.L.C.C.'s) disputes Settlement system;
>
> (b) to promote the growth and effective functioning of national arbitration institutions;
>
> (c) to promote the wider use and application of the UNCITRAL Arbitration Rules of 1976 within the Asian and Pacific region;
>
> (d) to provide facilities for *ad hoc* arbitrations as well as arbitrations held under the auspices of the Centre and other arbitral institutions and the rendering of assistance in the enforcement of arbitral awards.

FUNCTIONS

The functions of the Centre are, ***inter alia*:**

(i) to promote international commercial arbitration in the region served by it including provision of facilities for holding of arbitration proceedings at the Centre;

(ii) to co-ordinate and assist the activities of existing arbitral institutions in the region;

(iii) to render assistance in the conduct of ad hoc arbitrations, particularly those held under the UNCITRAL Rules;

(iv) to assist in the enforcement of arbitral awards;

(v) to provide for arbitration under its own auspices; and

(vi) to carry out the functions envisaged in the agreement with the International Centre for the Settlement of Investment Disputes (I.C.S.I.D.).

(emphasis added)

[89] Based on our understanding, the Court of Appeal appears to have arrived at its decision on the basis that the AIAC's functions in relation to statutory adjudication were not expressly mentioned as part of its objectives and functions in the 1981 host country agreement. This then led to the finding that the effect of the agreement was solely to provide for the function of the AIAC as an institution to promote and facilitate international arbitration, and the same was accordingly the only function covered by the immunity conferred under the IOPIA.

[90] In our respectful view, the Court of Appeal erred in taking an overly narrow and pedantic reading of the 1981 host country agreement in the above manner. It is clear from the use of the phrase "*inter alia*" in reference to the functions of the AIAC that its functions as set out in the agreement are not exhaustive.

[91] Indeed, the 1981 host country agreement could not have set out the functions of the AIAC in relation to statutory adjudication as the CIPAA was only enacted more than three decades later. The more logical perspective is that the agreement endows the AIAC with broad and general functions which are to be interpreted and reinterpreted as the international landscape evolves.

[92] The host country agreement is not a static document but one that must be construed dynamically in light of the fundamental object and purpose behind the establishment of the AIAC. The broad and flexible method of construction to be employed in relation to the host country agreement is explicated by Sean D Murphy in *Principles of International Law* (2nd edn, Thomson Reuters, 2012) at p. 48:

> An international organisation is expected to evolve over time, and its constituent instrument is regarded as needing to evolve with it, rather than remain static. Consequently, such an instrument is often interpreted not just by focusing on the ordinary meaning of the treaty language, but also by considering the organisation's basic purpose and goals, and how those goals may be achieved in a changing world. This purposive – or "teleological" – approach to interpretation of the constituent instrument attempts to give greater vitality to the international organisation than might otherwise exist under standard treaty interpretation.

[93] It must be emphasised that the AIAC's function as envisioned under the 1981 host country agreement was not limited to administering international arbitration matters but also extended to catering for domestic arbitrations. As such, the reasoning adopted by the Court of Appeal that the immunity conferred on the AIAC under the IOPIA was only intended to cover functions of an "international" character and was, therefore, not applicable to "domestic" functions such as statutory adjudication is, with respect, untenable.

[94] Since its establishment, the AIAC has grown from an arbitral institution to a full-fledged ADR hub of global repute. In addition to arbitration and statutory adjudication, it provides a wide range of other ADR services including mediation and domain name dispute resolution services. To restrict the immunity under the IOPIA only to situations where the AIAC acts in the capacity of an international arbitral institution, as done by the Court of Appeal below, would necessarily mean that the organisation will not enjoy immunity in respect of any of its other extensive range of ADR functions. This would have the effect of crippling the functioning of the AIAC. In our considered view, it cannot have been the intention of Parliament to stifle the functioning of the AIAC in such a manner.

[95] The most recently concluded host country agreement between the AALCO and the Government of Malaysia in 2023 delineates the objectives and functions of the AIAC in a more precise and detailed manner. It expressly refers to the functions of the AIAC in relation to promoting and facilitating ADR services, which would inevitably include statutory adjudication. In this regard, the 2023 host country agreement states as follows:

> ARTICLE II
>
> OBJECTIVES
>
> The objectives of establishing the Centre are as follows:
>
> (a) to act as a coordinating agency in the AALCO dispute settlement system;
>
> (b) **to promote the growth and effective functioning of** arbitration institutions and **other alternative dispute resolution** (hereinafter referred to as "ADR") **services**, including online dispute resolution services, in Malaysia;

(c) **to promote the wider application of various ADR rules** within the Asian and Pacific region;

(d) **to provide facilities for ADR services** including ad hoc arbitrations as well as arbitrations held under the auspices of the Centre and other arbitral institutions; and

(e) to provide assistance in enforcement of arbitral awards.

ARTICLE III

FUNCTIONS AND DUTIES OF THE CENTRE

The Centre shall have the following functions and duties:

(a) **promoting** international commercial arbitration and **ADR services in the region**:

(b) coordination of activities and assistance to existing arbitration institutions in the region:

(c) providing assistance to ad hoc arbitrations;

(d) assisting in the enforcement of arbitral awards;

(e) **conducting** arbitrations and **ADR services under the auspices of the Centre**: and

(f) **performing other necessary activities**, in consultation with the Secretary-General, **in achieving the objectives of the Centre**.

(emphasis added)

[96] Furthermore, the supplementary agreement to the host country agreement signed between the AALCO and the Government of Malaysia in 2024 expressly mentions the responsibility of the director of the AIAC to manage adjudication matters including the appointment of adjudicators:

> the director shall manage matters related to arbitration, mediation, and **adjudication** including the appointment of arbitrators, mediators and **adjudicators** under the relevant laws of Malaysia.
>
> (emphasis added)

[97] Although the aforesaid 2023 host country agreement and the 2024 supplementary agreement to the host country agreement were not in existence at the time of the making of the KLRCA Regulations, the provisions of these agreements are nonetheless relevant for the purposes of shedding light on the full extent of the AIAC's functions as envisaged by the AALCO and the Government of Malaysia under the original host country agreement in 1981.

[98] Flowing from the foregoing, it is clear that the functions of the AIAC as envisaged under the 1981 host country agreement extend beyond the mere conduct of arbitration proceedings. The KLRCA Regulations were made to give effect to the AIAC's functions in respect of ADR as a whole, including

statutory adjudication under the CIPAA. Thus, the AIAC in acting as the statutory adjudication authority is clothed with immunity pursuant to the IOPIA.

[99] The Court of Appeal below had, with respect, misapplied s. 11(5) of the IOPIA. In holding that the immunity under the IOPIA only applies when the AIAC functions as an international arbitral institution and not when it functions as the statutory adjudication authority, the Court of Appeal had effectively compartmentalised the concept of immunity and failed to appreciate that the functions of the AIAC are not limited to arbitration only.

[100] Premised on the above, we find that there is no necessity to draw a distinction on the capacity of the AIAC either as an international arbitral institution or the statutory adjudication authority before it is entitled to enjoy the immunity conferred under the IOPIA.

[101] There is another important point that we wish to highlight. The AIAC was appointed by Parliament as the statutory adjudication authority under the CIPAA. We do not think that Parliament could have unilaterally assigned such a function to the AIAC without prior consultation with the AALCO. This is because the AIAC was not established unilaterally by the Malaysian Government but rather through a bilateral host country agreement between the AALCO and the Government of Malaysia. Any delegation of authority to the AIAC under the CIPAA must have been done in consultation with the AALCO. As such, there is an implied consent by the AALCO to the exercise of the AIAC's functions under the CIPAA.

[102] The appointment of the AIAC as the statutory adjudication authority recognises the fact that adjudication does fall within the AIAC's functions. If adjudication was not part of its designated functions, the AIAC could not have been appointed as the adjudication authority under the CIPAA. The appointment also aligns with the AIAC's broader mandate since the institution plays the same role in relation to arbitration and other forms of ADR in Malaysia.

Whether The Acts And Decisions Of The AIAC Are Ultra Vires

[103] To reiterate, we found that the immunity conferred on the AIAC pursuant to the IOPIA is of a functional nature, although in principle it enjoys absolute immunity within the confines of its functional framework. We have further determined that the functions carried out by the AIAC as the statutory adjudication authority under the CIPAA fall within such functional framework and are therefore covered by immunity pursuant to the IOPIA.

[104] It necessarily follows that the AIAC enjoys immunity in the exercise of its statutory adjudication functions only to the extent that it acts within the framework of the CIPAA. Any act or decision of the AIAC which contravenes the CIPAA will be *ultra vires*, in which case immunity will not be applicable.

[105] The judicial review application filed by One Amerin in the High Court, which forms the subject matter of the present appeals, challenges the legality and constitutionality of certain acts and decisions carried out or made by the AIAC in the exercise of its functions as the statutory adjudication authority. The grounds underlying the application for judicial review are set out in para. 21 of this judgment. Upon careful scrutiny of the same, we are satisfied that there is no merit to the contentions by One Amerin that the AIAC had acted outside its scope of powers and functions under the CIPAA.

[106] In any challenge against a decision made by an international organisation in the exercise of its functions, the position is that such decision is cloaked with a presumption of legality. In other words, when an international organisation takes an action which warrants the assertion that it was appropriate for the fulfilment of one of its organisational purposes and functions, the presumption is that such action is not *ultra vires* the organisation and is thus covered by immunity (see: *International Court of Justice, 'Certain expenses of the United Nations* (art. 17, para. 2, of the Charter)' Advisory Opinion of 20 July 1962, ICJ Reports 1962, p. 151, at p. 167).

[107] On the facts of the present appeals, we find that One Amerin had failed to overcome the presumption of legality in respect of the AIAC's actions and decisions based on the following reasons:

(i) the adjudicator was validly appointed by the director of the AIAC pursuant to s. 21(b)(i) of the CIPAA. There was no agreement between the parties to appoint an adjudicator within ten working days from the service of the notice of adjudication by Ragawang as stated under s. 21(a) of the CIPAA. Thereafter, the director of the AIAC appointed the adjudicator upon Ragawang's request. Section 21 of the CIPAA does not impose a positive obligation upon Ragawang to nominate its proposed adjudicator for One Amerin's consideration nor does it contemplate that such a nomination is required for the purposes of the phrase "[b]y agreement of the parties" in s. 21(a) of the CIPAA;

(ii) the AIAC Rules were lawfully made by the AIAC pursuant to ss. 32 and 33 of the CIPAA. Section 32(d) empowers the AIAC to undertake any functions as may be required for the efficient conduct of adjudication under the CIPAA. This provision is phrased in broad terms and clearly authorises the AIAC in its capacity as the statutory adjudication authority to make the AIAC Rules;

(iii) the AIAC Rules meet the requirements of adjudication procedure as set out in the CIPAA. As such, the AIAC Rules are not *ultra vires* the CIPAA; and

(iv) the administrative fee charged by the AIAC under Schedule III to the AIAC Rules is not unconstitutional. The AIAC is tasked with providing administrative support for the conduct of adjudication under the CIPAA and is thus authorised to impose an administrative fee pursuant to s. 32(d) of the CIPAA for the purposes of ensuring the efficient conduct of adjudication proceedings.

[108] Flowing from the above, we are satisfied that the AIAC had acted within its scope of functions as prescribed under the CIPAA and is therefore immune in the exercise of such functions against any proceedings in respect of the same.

Whether The Immunity Under The IOPIA Extends To Judicial Review Proceedings

[109] In finding that the IOPIA did not confer immunity on the AIAC in the present case, the Court of Appeal below further reasoned that the words "from suit and from other legal process" in the First Schedule to the IOPIA did not include judicial review proceedings. That interpretation is, however, erroneous in light of the decision of this court in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199; [2021] 5 MLJ 209 ('*Sundra Rajoo*').

[110] In *Sundra Rajoo*, the Attorney General had instituted criminal charges against the appellant, who was a former director of the AIAC, in respect of offences allegedly committed by the appellant in his capacity as the director of the AIAC. Consequently, the appellant filed an application for judicial review seeking, among others, declaratory and prohibitory reliefs to give effect to his legal immunity status and to stop his prosecution by the Attorney General. The appellant claimed immunity pursuant to Part II of the Second Schedule to the IOPIA, namely, "[i]mmunity from suit and from other legal process in respect of acts and things done in his capacity as (the director of the AIAC)".

[111] Having observed that Parliament had left the words "from other legal process" in Part II of the Second Schedule to the IOPIA vague and ambiguous without clearly excluding immunity in respect of criminal proceedings, the court set out the following principles with regards to the statutory construction of domestic legislation dealing with public international law issues:

> When exercising their interpretive role, the Courts must be cautious to construe legislation by having regard to their overall purpose and the subject upon which they touch.

...

In the present appeal, we were asked to interpret a law passed by Parliament concerning the Federation of Malaysia's compliance with international law. [The IOPIA] serves to ratify an international agreement governed by international law, in this context, the Host Country Agreement. Further, the law on immunity (whether in connection with diplomatic officials or international organisations) significantly impacts Malaysia's international relations.

...

In construing ambiguous domestic law, if there are at least two possible interpretations, that is, one which puts the State in breach of its international law obligations and the other which does not - the Courts ought to prefer the approach which secures the State's compliance with international law.

(emphasis added)

[112] Following from the above, the court took into consideration the purpose for which immunity was granted to the appellant in determining whether he was immune from criminal proceedings under the IOPIA:

It is pertinent to state that we were guided by the general aim of the purpose of the immunity which was granted, to wit, to protect and preserve the inviolability of AIAC, its documents and its archives. Where the Malaysian former High Officer acts in his official capacity, the purpose of conferring that immunity remains the same whether the nature of the proceedings against him are civil or criminal unless the Host Country Agreement or [the IOPIA] provided otherwise.

[113] It was accordingly held that the words "legal process" in Part II of the Second Schedule to the IOPIA ought to be construed to include criminal proceedings in line with the Malaysian Government's international law obligations unless Parliament clearly expressed a contrary intention. The court noted that to read the material provisions of the IOPIA in any other way would risk exposing Malaysia to a violation of international law on immunities and privileges. The court added that where it was unsure whether the law conferred immunity in respect of criminal proceedings or not, it ought to err on the side of caution.

[114] The First Schedule to the IOPIA also confers immunity on the AIAC "from other legal process". In line with the reasoning adopted by this court in *Sundra Rajoo*, those words must be construed by considering the conventional international law purpose behind the immunity, namely, to safeguard the independence of the AIAC in the performance of its functions. The purpose of conferring that immunity remains the same regardless of whether the nature of the proceedings against the AIAC are civil, criminal or public law, unless the IOPIA provides otherwise.

[115] It is clear that Parliament has not expressly excluded immunity in respect of judicial review proceedings from the ambit of the First Schedule to the IOPIA. The provision, which has been left ambiguous by Parliament, ought to be construed in a manner which accords with the State's international law obligations.

[116] The immunity conferred under the IOPIA is necessary to ensure the inviolability of the records, documents, archives and general process of the AIAC. The fact that these appeals concern judicial review proceedings does not mitigate the effect of the purpose of the immunity granted to the organisation. The risk of jeopardising the independence of the AIAC in the exercise of its functions is the same notwithstanding whether the proceedings against the institution are of a civil, criminal or public law nature.

[117] This court in *Sundra Rajoo* construed the words "legal process" in the IOPIA to include criminal proceedings. It follows *a fortiori* that the words must also include judicial review proceedings. To read the phrase in any other way would minimise and whittle down the immunity granted under the IOPIA in a manner that Parliament could not have intended. Thus, we find that the immunity enjoyed by the AIAC in the exercise of its functions pursuant to the First Schedule to the IOPIA extends to judicial review proceedings. The Court of Appeal, with respect, erred in holding the contrary.

The Immunity Conferred On The AIAC Under Section 34(1) Of The CIPAA

[118] Aside from the IOPIA, the AIAC is also afforded immunity in the performance of its statutory adjudication functions by s. 34(1) of the CIPAA, which reads as follows:

> No action or suit shall be instituted or maintained in any court against an adjudicator or the KLRCA or its officers for any act or omission done in good faith in the performance of his or its functions under this Act.

[119] One Amerin argues that s. 34(1) of the CIPAA dilutes the effect of the First Schedule to the IOPIA. According to One Amerin, the fact that Parliament had enacted s. 34(1) of the CIPAA to specifically accord immunity to the AIAC in the exercise of its functions under the CIPAA means that the immunity conferred pursuant to the IOPIA was not intended to cover those functions. Otherwise, s. 34(1) of the CIPAA would have been enacted in vain.

[120] With respect, we are unable to agree with the above contentions. The First Schedule to the IOPIA and s. 34(1) of the CIPAA cannot be read in isolation as suggested by One Amerin. The rationale behind the grant of immunity to the AIAC pursuant to s. 34(1) of the CIPAA is to enable the institution to carry out its functions as the statutory adjudication authority

under the CIPAA in a completely independent manner. This is in line with the purpose of immunity conferred pursuant to the First Schedule to the IOPIA, namely, to protect and preserve the independence of the AIAC in the exercise of its functions, which as we have determined earlier, includes its functions under the CIPAA. It follows that the First Schedule to the IOPIA and s. 34(1) of the CIPAA ought to be construed harmoniously so as to give effect to the purpose and object behind the enactment of both provisions.

[121] The immunity afforded to the AIAC under s. 34(1) of the CIPAA is not absolute as the provision deprives the AIAC of the protection of immunity if there is want of good faith in the performance of its functions under the CIPAA. The concept of "good faith" is not defined under the CIPAA but generally is accepted to refer to honest conduct or faithfulness in the discharge of an obligation or duty. It extends to an absence of intent to defraud, deceive or seek an unfair advantage (see: Sundra Rajoo and Harbans Singh KS, *Construction Law in Malaysia* (Sweet & Maxwell Asia, 2012) at p. 585, citing Chow Kok Fong, *Construction Contracts Dictionary* (Sweet & Maxwell Asia, 2006) at pp. 175 and 176).

[122] The requirement of good faith in the context of s. 34(1) of the CIPAA is further explicated by Lam Wai Loon and Ivan YF Loo in *Construction Adjudication in Malaysia* (2nd edn, Sweet & Maxwell Asia, 2018) at para [18.007] by way of reference to the English cases of *Melton Medes Ltd And Another v. Securities And Investment Board* [1995] 2 WLR 247 and *Bourgoin SA v. Ministry Of Agriculture, Fisheries And Food* [1986] QB 716:

> It is considered that want of "good faith" in this context connotes either dishonesty, fraud or bribery; or malice in the sense of personal spite or desire to injure for improper reasons; or knowledge of absence of power to exercise the power or function in question.

[123] The construction to be accorded to the term "good faith" as found in the equivalent provision in Singapore has been considered by Chow Kong Fong in *Security of Payments and Construction Adjudication* (2nd edn, LexisNexis, 2013) at para. [15.143]:

> The expression 'good faith' is not defined in the Act but it is considered that this should be construed in the same manner as that which applies to administrative bodies discharging statutory functions. In administrative law, a power is exercised in 'bad faith' if it has been exercised for purposes other than those for which the power was conferred.

[124] In short, s. 34(1) of the CIPAA does not afford immunity to the AIAC for any action or omission which is not done in the exercise of its powers or functions under the CIPAA. This qualification is entirely consistent with the functional nature of the immunity conferred on the AIAC pursuant to the First Schedule to the IOPIA.

[125] Good faith is a general principle of international law. Its modern formulation derives from the Roman concept of *bona fides*, which refers to trustworthiness, conscientiousness and honourable conduct. In fact, good faith has been regarded as a fundamental principle of international law because it upholds the integrity and effectiveness of the international legal order by fostering respect for the law as well as trust and confidence in legal relations. This in turn ensures the stability and predictability of international legal relations. It is for this reason that the principle of good faith informs all international legal relations, including those established by international organisations (see: Russell Buchan and Nicholas Tsagourias. '*Hacking international organizations: The role of privileges, immunities, good faith and the principle of State sovereignty*' 104 International Review of the Red Cross 1171).

[126] Based on the foregoing, it can be surmised that there is an implicit condition of good faith contained in the IOPIA, requiring the AIAC to fully and efficiently discharge its duties, and fulfil its purposes and functions. This, in effect, translates to the functionally restricted nature of immunity conferred on the AIAC pursuant to the First Schedule to the IOPIA, meaning that the AIAC only enjoys immunity in the performance of its powers and functions. Therefore, the good faith qualification in s. 34(1) of the CIPAA does not dilute, but rather is consonant with, the immunity granted under the First Schedule to the IOPIA.

[127] In any event, One Amerin argues that the AIAC cannot be accorded immunity under s. 34(1) of the CIPAA on the basis that its actions and decisions are *ultra vires* the CIPAA and thus, are not done in good faith in the performance of its functions under the CIPAA. The burden of proving the same plainly lies on One Amerin. Based on the reasons stated in para. 107 of this judgment, we find that One Amerin has failed to establish that the AIAC has acted *ultra vires* the CIPAA or otherwise in bad faith. We accordingly find that the AIAC is entitled to immunity pursuant to s. 34(1) of the CIPAA.

[128] In this regard, the Court of Appeal below erred in finding that the AIAC did not enjoy immunity under s. 34(1) of the CIPAA in the present case on the grounds that the words "action" and "suit" in the section did not include judicial review proceedings. The Court of Appeal, with respect, failed to construe s. 34(1) of the CIPAA harmoniously with the First Schedule to the IOPIA in order to give effect to the purpose of both provisions, which is to safeguard the independence of the AIAC in the exercise of its functions. The Court of Appeal also failed to give due consideration to the decision of this court in *Sundra Rajoo*, which requires ambiguous domestic law to be construed in a manner that is consonant with international law. The interpretation accorded to s. 34(1) of the CIPAA by the Court of Appeal risks exposing our country to a violation of international law on immunities and privileges.

[129] For completeness, we will also deal with the contention raised by the AIAC to the effect that the judicial review application by One Amerin ought not be allowed as One Amerin has recourse to an alternative remedy pursuant to ss. 15 and 16 of the CIPAA. We are unable to agree with this contention. Sections 15 and 16 of the CIPAA respectively provide for the setting aside and stay of an adjudication decision on a limited number of grounds. These provisions do not provide an avenue for One Amerin to challenge the legality and constitutionality of the actions and decisions of the AIAC as has been done in the present case. Such challenges are of a public law nature and can only be brought by way of judicial review (see: *Mega Sasa Sdn Bhd v. Kinta Bakti Sdn Bhd & Ors* [2020] 4 CLJ 201; [2020] 10 MLJ 409 at para. [65]). However, this does not detract from our earlier finding that the AIAC enjoys immunity from judicial review proceedings under both the IOPIA and the CIPAA for the reasons enumerated above.

The Position In Other Jurisdictions

[130] The United Kingdom was the first country which introduced a statutory adjudication mechanism for settling disputes arising under construction contracts through Part II of the Housing Grants, Construction and Regeneration Act 1996 ('the UK Act'). It was followed by similar – *albeit*, far more detailed and prescriptive – legislation in Australia, New Zealand and Singapore. In more recent years, statutory adjudication schemes have also been introduced in Ireland, Canada and Hong Kong.

[131] While the detailed implementation of the statutory adjudication regimes varies between different jurisdictions, the base concept remains the same, to wit, an accessible, inexpensive and timely mechanism to resolve payment disputes and maximise cash flow through a decision-making process that is binding on both parties until it is revisited in final determination (see: James Pickavance, *A Practical Guide to Construction Adjudication* (Wiley-Blackwell, 2016)).

[132] The UK has a large number of adjudication authorities, which are known as "adjudicator nominating bodies" under the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649). These include the Institution of Civil Engineers and the International Chamber of Commerce. Unlike the CIPAA, the UK Act only provides for the immunity of the adjudicator and does not confer immunity on the adjudicator nominating bodies.

[133] The legal framework that governs adjudication claims in Australia primarily stems from the Building and Construction Industry Security of Payment Act 1999 ('the SOP Act'). However, each Australian state and territory has enacted its own version of this legislation. For instance, in New South Wales, the SOP Act is the governing legislation, while Queensland operates under the Building and Construction Industry Payments Act 2004.

[134] In New South Wales, an adjudication authority is known as an "authorised nominating authority" (see: ss. 4 and 28(1) of the SOP Act). There are a number of bodies operating as authorised nominating authorities in New South Wales, such as the Australian Building & Construction Dispute Resolution Service and the Master Builders Association of New South Wales Pty Ltd.

[135] An authorised nominating authority in New South Wales is explicitly conferred immunity pursuant to s. 30(2) of the SOP Act, although we note that this provision has not been tested before the New South Wales Courts. Section 30 of the SOP Act is reproduced below for ease of reference:

> Protection from liability for adjudicators and authorised nominating authorities
>
> (1) An adjudicator is not personally liable for anything done or omitted to be done in good faith:
>
> (a) in exercising the adjudicator's functions under this Act, or
>
> (b) in the reasonable belief that the thing was done or omitted to be done in the exercise of the adjudicator's functions under this Act.
>
> (2) *No action lies against an authorised nominating authority or any other person with respect to anything done or omitted to be done by the authorised nominating authority in good faith*:
>
> (a) *in exercising the nominating authority's functions under this Act*, or
>
> (b) *in the reasonable belief that the thing was done or omitted to be done in the exercise of the nominating authority's functions under this Act.*
>
> (emphasis added)

[136] In New Zealand, the relevant legislation is the Construction Contracts Act 2002 ('the NZ Act'). An adjudication authority in New Zealand is also known as an "authorised nominating authority" (see: ss. 5 and 65 of the NZ Act). However, unlike in New South Wales, the NZ Act only grants immunity to the adjudicator (see: s. 70 of the NZ Act) and does not provide immunity to the authorised nominating authorities.

[137] Notwithstanding the provisions referred to above which grant immunity to adjudicators, we note that the courts in both New South Wales and New Zealand permit judicial review of decisions of adjudicators (see, for example: *Chase Oyster Bar v. Hamo Industries* [2010] NSWCA 190; *Tayler v. LaHatte* [2008] NZHC 980). This is because, unlike s. 15 of the CIPAA, there is no provision under the SOP Act or the NZ Act that expressly allows an aggrieved party to apply to the court to set aside an adjudication decision on specified grounds. Consequently, the courts in these jurisdictions provide recourse to a party aggrieved by an adjudicator's determination through

judicial review. We also note that the SOP Act and the NZ Act merely exclude the "liability' of an adjudicator, as opposed to the barring of any "action" against an authorised nominating authority under the SOP Act which necessarily connotes a wider ambit of immunity.

[138] In Singapore, the legislation governing statutory adjudication is the Building and Construction Industry Security of Payment Act ('the Singapore Act'). This legislation was largely modelled after the SOP Act. The Singapore Mediation Centre ('the SMC') is the designated adjudication authority, known as the "authorised nominating body", which administers adjudication proceedings under the Singapore Act (see: s. 28(1) of the Singapore Act). The SMC is expressly conferred immunity pursuant to s. 32(2) of the Singapore Act. We reproduce s. 32 of the Singapore Act below:

> Protection from liability for adjudicators and authorised nominating bodies
>
> (1) No liability shall lie against an adjudicator with respect to anything done or omitted to be done in good faith in the discharge or purported discharge of the adjudicator's functions or duties under this Act.
>
> (2) *No liability shall lie against an authorised nominating body or any person acting under the direction of the authorised nominating body with respect to anything done or omitted to be done:*
>
> (a) *in good faith in the discharge or purported discharge of the authorised nominating body's function of nominating adjudicators under this Act*; and
>
> (b) *in good faith and with reasonable care in the discharge or purported discharge of any other functions or duties of the authorised nominating body under this Act*.
>
> (emphasis added)

[139] We note that there are no reported cases dealing with s. 32 of the Singapore Act. It is also observed that s. 32(2) of the Singapore Act only excludes the "liability" of the SMC unlike s. 34(1) of the CIPAA which confers immunity on the AIAC against any "action or suit". In our view, this difference can be understood by reference to the fact that the legal status of the adjudication authority in Singapore is not analogous to that in Malaysia. This is because the SMC, unlike the AIAC, is not an international organisation. In the circumstances, the apparently lower standard of immunity granted to the adjudication authority under the Singapore Act has no bearing on our construction of s. 34(1) of the CIPAA.

[140] The position in Ireland is somewhat unique. In Ireland, statutory adjudication is governed under the Construction Contracts Act 2013 ('the CCA') and administered by the Construction Contracts Adjudication Service of the Department of Enterprise, Trade and Employment, which is a department of the Government of Ireland. The CCA only grants immunity to the adjudicator (see: s. 6(14) of the CCA) and not to the adjudication authority.

[141] In *K&J Townmore Construction Limited v. Keogh* [2023] IEHC 509, a party sought leave to commence judicial review against the decision of an adjudicator on his jurisdiction to adjudicate a dispute referred to him. The key question that arose before the High Court of Ireland was whether a challenge to the adjudicator's decision should be made before the adjudication was complete by means of a judicial review, or whether the same should take place after the adjudication was complete through enforcement proceedings envisaged by the CCA.

[142] The High Court of Ireland refused to grant leave for judicial review. In arriving at its decision, the High Court of Ireland took into account the following factors which we believe are relevant to the present appeals, notwithstanding that the case involved judicial review against an adjudicator rather than an adjudication authority:

(i) the underlying rationale of the CCA was to ensure the speedy resolution of payment disputes arising out of construction contracts. The involvement of judicial review in the adjudication process means that there will be a significant impact on the time it will take to resolve the dispute, which in turn will result in a failure to achieve the aim of the CCA that payment disputes be resolved expeditiously;

(ii) the CCA was enacted with the aim of ensuring that the legal costs incurred by parties to a construction contract will be significantly less than the costs of litigation. This advantage of adjudication will disappear if judicial review were to be permitted against the adjudicator's decision; and

(iii) permitting the decision of an adjudicator to be challenged by way of judicial review would be inconsistent with the speedy dispute resolution mechanism contained in the CCA and would also incentivise parties to a construction contract to judicially review adjudications in order to delay payments.

[143] In our view, these observations apply with equal force to the present appeals. The CIPAA was introduced by Parliament as a simple, quick and cheap mechanism for resolving payment disputes in the construction industry without having to wait for the slower and more expensive traditional process of resolving such disputes through litigation or arbitration which has been

seen as stifling cash flow in the industry. This rationale ought to be given effect in construing s. 34(1) of the CIPAA as required under s. 17A of the Interpretation Acts 1948 and 1967.

[144] The court cannot allow the adjudication process to be disturbed in a liberal fashion through judicial review proceedings. If s. 34(1) of the CIPAA were to be read in any other way, it will defeat the entire purpose of the CIPAA by delaying the adjudication process and unnecessarily placing added costs on the parties.

The Distinction Between Immunity Clauses And Ouster Clauses

[145] A further reasoning advanced by the Court of Appeal below in support of its decision was that the jurisdiction of the High Court can only be ousted by legislation through the use of unmistakably explicit words. In this regard, it was held that the AIAC was not immune from judicial review proceedings since neither the IOPIA nor the CIPAA clearly excludes judicial review.

[146] The Court of Appeal, with respect, fundamentally erred in failing to appreciate the distinction between immunity clauses and ouster clauses. The difference between the two types of provisions has been clearly elucidated by the Singapore Court of Appeal in *Nagaenthran Dharmalingam v. PP And Another Appeal* [2019] SGCA 37 ('*Nagaenthran*').

[147] In *Nagaenthran*, the Singapore Court of Appeal defined ouster clauses in the following manner:

> Ouster clauses (also variously known as privative, preclusive, finality or exclusion clauses) are statutory provisions which *prima facie* prohibit judicial review of the exercise of the discretionary powers to which they relate ... Such clauses may be worded differently, but properly construed, their broad import is clear: **they seek to oust the court's jurisdiction to exercise the power of judicial review** ...
>
> (emphasis added)

[148] The position of law in our jurisdiction is that ouster clauses in certain circumstances are unconstitutional. In that context, this court held in *Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors* [2022] 5 CLJ 1; [2022] 3 MLJ 356 and *Nivesh Nair Mohan v. Dato' Abdul Razak Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* (Criminal Appeal No. 05(HC)-7-01/2020(W)) (unreported) ('*Nivesh Naif*') that certain provisions of the Prevention of Crime Act 1959 which ousted the jurisdiction of the courts to exercise the power of judicial review were unconstitutional and accordingly struck them down under arts. 121 and 4(1) of the Federal Constitution.

[149] The following observations were made by this court in *Nivesh Nair* in relation to the effect of ouster clauses:

> Every legal power must have legal limits and it is for the Courts to determine such limits in accordance with the law. If the Courts are not permitted to decide the perimeters of those powers due to ouster clauses

A it is tantamount to an incursion into judicial power and is therefore violative of separation of powers and the Rule of Law as espoused in Article 4(1) of the Federal Constitution.

The Judiciary is required to check and balance the exercise of executive power and ouster clauses seek to interfere and limit the exercise of the
B basic tenet of the judicial function.

[150] Immunity clauses, on the other hand, are clauses which immunise parties from legal proceedings. Parliament may, from time to time, enact such immunity clauses. Like ouster clauses, immunity clauses may be worded differently. But unlike ouster clauses, they do not exclude the courts'
C jurisdiction or authority to act in a matter.

[151] The characteristics of an immunity clause are as set out below by the Singapore Court of Appeal in *Nagaenthran*:

D ... statutory immunity clauses share certain characteristics. First, *they are exceptional in that they preclude claims being brought against certain classes of persons under prescribed conditions* where ordinarily, such persons might otherwise be subject to some liability.

Second, *statutory immunity clauses commonly seek to protect persons carrying out public functions*. It is on account of the responsibilities that burden the exercise of such public functions and the desire not to hinder their
E discharge that such immunity clauses are commonly justified. ... Third, and as a corollary to this, *such immunity generally would not extend to the misuse or abuse of the public function in question; nor would the immunity typically apply where its beneficiary exceeded the proper ambit of the functions of his office*.

(emphasis added)

F **[152]** In that light, we turn to consider the true nature and interpretation of the First Schedule to the IOPIA and s. 34(1) of the CIPAA. In our view, these provisions are not ouster clauses as characterised by the Court of Appeal below, but rather are immunity clauses. The effect of these provisions is to immunise the AIAC from legal proceedings in the exercise
G of its functions. Nothing in these provisions purports to exclude the jurisdiction of the High Court to review any act or omission of the AIAC which is not done in good faith in the performance of its functions.

[153] As explained earlier, there are important reasons why Parliament has conferred upon the AIAC a broad immunity from legal proceedings in
H relation to the discharge of its functions. The immunity granted to the AIAC emanates from an international agreement. The rationale behind the grant of immunity is to protect the independence of the AIAC so as to ensure its ability to function autonomously and effectively and to enable the institution to accomplish its object of promoting and facilitating ADR services in
I Malaysia. This can only be achieved if the First Schedule to the IOPIA and s. 34(1) of the CIPAA are construed to immunise the AIAC from judicial review in the exercise of its functions.

Conclusion

[154] In the circumstances, we are constrained to hold that the Court of Appeal was wrong in finding that the AIAC did not enjoy immunity from judicial review proceedings pursuant to the IOPIA and the CIPAA in the performance of its functions as the statutory adjudication authority. We therefore, allow the appeals and set aside the decision of the Court of Appeal.

[155] We now turn to the questions of law as posed before us:

> Question 1: Whether the immunity from suit and from other legal process in paragraph 1 of the First Schedule to the IOPIA conferred upon the AIAC as an international organisation under the KLRCA Regulations is applicable to render the AIAC immune from judicial review of acts and decisions made by the AIAC in its capacity as the domestic and statutory adjudication authority under the CIPAA.
>
> Answer: We answer the question in the affirmative.
>
> Question 2: Whether the High Court's inherent powers in judicial review proceedings can be ousted by the immunity conferred on the AIAC by virtue of legislations passed by Parliament, *ie*, the IOPIA and the CIPAA.
>
> Answer: The IOPIA and the CIPAA do not oust the High Court's inherent powers in judicial review proceedings. The premise of the question is misconceived. We thus decline to answer the question.
>
> Question 3: Whether there is a necessity to draw a distinction on the capacity of the AIAC either as an international arbitral institution or the statutory adjudication authority before the AIAC is entitled to enjoy the immunity conferred under the IOPIA and the CIPAA.
>
> Answer: We answer the question in the negative.

[156] Since these appeals concern a matter of public interest, we make no order as to costs.

Abu Bakar Jais FCJ (concurring):

Introduction

[157] I agree with the full reasonings in the main grounds of judgment written by our learned sister Hanipah Farikullah FCJ explaining our unanimous decision in this case.

[158] However, I wish only to add a few words on the limited and specific topic regarding the scope and effect of s. 34 (1) of the Construction Industry Payment and Adjudicating Act 2012 ("CIPAA 2012"). This provision arose because the appellant in relying on the same, submitted it could not be sued and made a party to a court proceeding including the present challenge by way of judicial review it is facing, brought by the first respondent.

[159] The provision states as follows:

> No action or suit shall be instituted or maintained in any court against an adjudicator or the KLRCA or its officers for any act or omission done in good faith in the performance of his or its functions under this Act.

[160] First, it is appropriate to note there is no dispute that the above abbreviation "KLRCA" – Kuala Lumpur Regional Centre for Arbitration for all intents and purposes in our present case means the appellant.

Decision Of The High Court

[161] The learned High Court ("HC") judge found that the above statutory provision protects the appellant in this case. It enjoyed legal immunity or immunity from any court proceedings in view of this provision.

[162] Further, the learned HC judge also found that the provision is validly enacted and referred to the Federal Court ("FC") decision in the case of *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 in upholding the same. The passage referred in that case states as follows:

> [93] The preliminary position is that there is always a strong presumption in favour of the constitutionality of provisions in a statute. This is premised on the principle that Parliament cannot be presumed to intend an unconstitutional action. The burden is upon him who challenges the provision to show that they are unconstitutional (*Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566, *Ooi Kean Thong & Anor v. Public Prosecutor* [2006] 3 MLJ 389, *Public Prosecutor v. Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921). The court's function is merely to test the legality of an action against principles and standards established by the Constitution. Unless it is found that there has been a clear transgression of constitutional principles, the court would refrain from declaring the law as legislated by the Legislature to be invalid.

[163] The principle enunciated in the above case is quite trite. The provisions of a statute stand on the basis that the same are constitutional unless, it can be clearly proven otherwise. Likewise, s. 34(1) of the CIPAA 2012 as shown earlier must be premised on the understanding that it is constitutional as Parliament could not have intended the same to be enacted unconstitutionally. In this regard, I am of the view that the first respondent before us had not been able to prove any transgression of constitutional principles warranting the said provision to be declared unconstitutional.

[164] Another case of the FC that presumed the constitutionality of a statute is *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701; [2004] 2 MLJ 257 where it also approved the principle that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

[165] In respect of this statutory provision too, the first respondent had also contended that the legal immunity provided should not be applicable in judicial review cases. It is undisputed the first respondent had filed a judicial review against the appellant at the HC. Therefore, the first respondent submitted that the appellant could not rely on this provision to claim legal immunity from being sued.

[166] As indicated in the main grounds of judgment, we do not agree that this provision is not applicable in judicial review cases. There are no reasons to find that the wordings in this provision mean it is not to be applicable when a judicial review application is filed in court. This provision does not state in any manner that no legal immunity will be accorded if it involves a judicial review. In this regard, the word "suit" that appears in this statutory provision should be accorded its plain meaning. Literal reading of that word should be preferred as there is no ambiguity in the overall wordings of the provision. The FC in *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561 provides guidance on this point as it is said as follows:

> [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. *First, in construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it*. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. *Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute*. Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. *Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning*. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. *It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the Legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court "to travel outside them on a voyage of discovery are strictly limited." Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment*.
>
> (emphasis added)

[167] I also agree with the learned HC Judge who had referred to the 'Oxford Dictionary of Law' which defined the word "suit" simply as "a court claim". After all, reference on the meaning of words in dictionaries is a form of extrinsic aid to interpretation of statutes. An illustration of this reference is seen in the FC case of *Jabatan Pendaftaran Negara & Ors v. Seorang Kanak-kanak & Ors; Majlis Agama Islam Negeri Johor (Intervener)* [2020] 4 CLJ 731; [2020] 2 MLRA 487 where Rohana Yusuf PCA (as she then was) said:

A

> [28] We can safely conclude from the above plain dictionary meanings that there is a difference between a personal name and a surname. In the present case MEMK cannot therefore be a personal name and a family name at the same time. It is not a family name or hereditary name or inherited name commonly shared by for example, the wife and all members of the family as defined by the dictionary meaning.

B

[168] Also see the FC case of *Tenaga Nasional Bhd v. Majlis Daerah Segamat* [2022] 2 CLJ 497; [2022] 3 AMR 1 where Mohd Zawawi Salleh FCJ in delivering judgment, referred to a few dictionaries for the meaning of words in the Local Government Act 1976.

C

[169] In reference to s. 34(1) of the CIPAA 2012 too the learned HC judge was not wrong to conclude the extensive effect of the word "action" in that provision by referring to *Halsbury's Law of England*, 4th edn, Vol. 37 para. 17 that states as follows:

> Action means any civil proceedings commenced by writ or in any other manner prescribed by rule of court. It has a wide significance as including any method prescribed by those rules of invoking the court's jurisdiction for the adjudication or determination of a loss or legal right or claim of any justiciable issue, question or contest arising between two or more persons of affecting the status of one of them. In its natural meaning 'action' refers to any proceeding in the nature of a litigation between a plaintiff and a defendant. It includes any civil proceedings in which there is a plaintiff who sues, and a defendant who is sued, in respect of some cause of action, as contrasted with proceedings, such as statutory proceedings which are embraced in the word 'matter'.

D

E

Decision Of The Court Of Appeal

F

[170] Subsequently, the Court of Appeal ("COA") had reversed the decision of the HC. In respect of the issue on legal immunity, the COA relied on the FC case of *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81 to rule there is no legal immunity for the appellant against application for judicial review as there must be unmistakenly explicit provision to oust a judicial review from being taken. Therefore, the COA came to the conclusion that s. 34(1) of the CIPAA 2012 should not be applicable for the appellant.

G

[171] The above case is a *habeas corpus* case where the FC said:

> From the authorities cited, it seems clear that judicial review, which is essentially a creature of the common law, can be excluded by statutory legislation if the words used are unmistakably explicit.

H

[172] The above became the basis for the COA to find that the first respondent could not be prevented from filing a judicial review application against the appellant despite s. 34(1) of the CIPAA 2012 as referred earlier.

I

[173] The FC in the above case referred to the COA case of *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor And Another Appeal* [1998] 3 CLJ 85. In respect of this case the FC said:

> ... Gopal Sri Ram JCA, cited with approval the observation of Laws J in *R v. Lord Chancellor*, *ex parte Witham* [1997] 2 All ER 779. I draw attention to that part of the observation which states:
>
> > It seems to me, from all the authorities to which I have referred, that the common law has clearly given special weight to the citizen's right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right. But I must explain, as I have indicated I would, what in my view the law requires by such a permission. **A statute may give the permission expressly; in that case, it would provide in terms that in defined circumstances the citizen may not enter the court door**.
>
> (emphasis added)

[174] So, what the FC did in finding that judicial review could be prevented by Parliament only if the words of the legislation are mistakenly explicit was to refer to the above passage. However, with respect, must it be concluded that the above passage is authority to find in order to say that judicial review is inapplicable, the words in the legislation (in our case it is s. 34(1) of CIPAA 2012) must be explicit? It is my considered view that passage did not at all suggest a judicial review is not applicable only when the words in the legislation are unmistakenly explicit. In our present case, it would be sufficient to expressly prevent a judicial review application by the words already contained in s. 34(1) of the CIPAA 2012. For the sake of convenience and clarity this statutory provision is again narrated as follows:

> **No action or suit** shall be instituted or maintained in any court against an adjudicator or the KLRCA or its officers for any act or omission done in good faith in the performance of his or its functions under this Act.
>
> (emphasis added)

[175] Looking at the above, the parliamentary drafters in the Attorney General Chambers were indeed astute to use minimum words to cover numerous possibilities. It should also be clear that those words "no action or suit" certainly will include application for judicial review. It should also be appreciated that "action" or "suit" above are generic terms, thus inclusive of judicial review application, in our present case filed by the first respondent. In this regard, it should also be noted, it is a fundamental

principle of statutory interpretation that the clear words of a statute ought to be given effect. As pointed out in the textbook NS Bindra's on *Interpretation of Statutes* (10th edn) at pp. 438 to 439:

> In constructing a statutory provision, the first and fore- most rule of construction is the literary construction. All that we have to see at the very outset is what that provision says. If the provision is unambiguous, and if from that provision the intent is clear, we need not call into aid the other rules of the construction of statutes. The other rules of construction of statute are called into aid only when the legislative intention is not clear. When the language of a statute is plain and unambiguous, that is to say, admits but of one meaning, there is no occasion for construction.

[176] Further, in fact, the FC in the above case referred to another FC case, *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147, where it was held as follows:

> It is clear law that appellate review jurisdiction is solely a creature of statute while supervisory review jurisdiction is the creature of the common law and is available in the exercise of the courts' inherent power but, I would hasten to add, its extent may be determined not merely by judicial development but also by legislative intervention.

[177] Following the above, judicial review could be curtailed by legislative intervention and in our present case that legislative intervention is s. 34(1) of the CIPAA 2012. The words in this provision as explained would mean judicial review could not be taken against the appellant.

[178] The COA also decided that in reference to this statutory provision, there is a need for the appellant to act in good faith in the performance of its functions under this Act. (Please see this provision as shown earlier). Essentially there is a condition according to the COA in this provision for the appellant to act in good faith before it could claim legal immunity and hence this legal immunity is not absolute.

[179] On this issue of good faith, I can only subscribe and do no better than to adopt the reasonings as explained in the main judgment by our learned sister, Hanipah Farikullah FCJ.

Conclusion

[180] The appellant could rely on s. 34(1) of the CIPAA 2012 to protect itself as no action or suit shall be instituted or maintained in any court against it or its officers. The words of this statutory provision are clear and not ambiguous for it to be given effect in favour of the appellant.